No. 02-628 Status: ARGUED

Title: Linda Frew, on Behalf of Her Daughter, Carla Frew, et al., Petitioners

v.

Albert Hawkins, Commissioner, Texas Health and Human Services Commission, et al.

Docketed: October 24, 2002

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (00-41112/40667)

Decision Date: July 24, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 22 2002	Petition for writ of certiorari filed. (Response due November 25, 2002)
Oct 24 2002	Lodging consisting of ten bound copies of related material received from counsel for the petitioners.
Nov 25 2002	Waiver of right of respondent Albert Hawkins, Commissioner, Texas Health and Human Services Commission, et al. to respond filed.
Dec 5 2002	Response Requested . (Due January 6, 2003)
Dec 17 2002	Order extending time to file response to petition to and including February 5, 2003.
Feb 5 2003	Response to petition from respondent Albert Hawkins, Commissioner, Texas Health and Human Services Commission, et al. filed.
Mar 10 2003	Petition GRANTED limited to Questions 1 and 2 presented by the petition.
Mar 27 2003	Record received.
Mar 27 2003	Record proceedings from the U.S.C.A. for the Fifth Circuit (1 box).
Apr 9 2003	Motion to dispense with printed appendix filed by petitioner Linda Frew, on Behalf of Her Daughter, Carla Frew, et al.
Apr 10 2003	Extension of time to file the joint appendix and petitioner's brief on the merits to and including May 8, 2003.
Apr 14 2003	Record proceedings from the U.S.D.C. for the Eastern District of Texas (3 boxes).
Apr 21 2003	Motion to dispense with printed appendix filed by petitioner GRANTED.
May 8 2003	Brief amicus curiae of United States filed.
May 8 2003	Brief of petitioners Linda Frew, on Behalf of Her Daughter, Carla Frew, et al. filed.
May 8 2003	Brief amicus curiae of AARP, et al. filed.
May 27 2003	Extension of time within which to file respondents' brief on the merits to and including July 2, 2003.
Jul 2 2003	Brief amici curiae of National Conference of State Legislatures, et al. filed.
Jul 2 2003	Brief of respondents Albert Hawkins, Commissioner, Texas Health and Human Services Commission, et al. filed.
Jul 2 2003	Brief amicus curiae of Utah, et al. filed.
Jul 7 2003	SET FOR ARGUMENT October 7, 2003.
Jul 8 2003	SG for leave to participate/divided argument.
Jul 11 2003	CIRCULATED.
Aug 4 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 4 2003	Reply of petitioners Linda Frew, on Behalf of Her Daughter, Carla Frew, et al. filed.

Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, Carla Frew, *et al.*,

Petitioners,

v.

DON GILBERT, Commissioner of the Texas Health and Human Services Commission, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the Early and Periodic Screening Diagnosis and Treatment (EPSDT) component of the Medicaid Act. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Another case pending before this Court also involves EPSDT. *Haveman v. Westside Mothers*, No. 02-277. If the Court grants a writ of certiorari in that case to address questions related to this case, the Petitioner-children ask the Court to suspend this case pending resolution of the other.

1. Do State officials waive Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court's ongoing supervision of the officials' decree compliance?

2. Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by State officials unless the plaintiffs show that the "decree violation is also a violation of a federal right" remediable under § 1983?

3. Does State officials' failure to provide services required by the Medicaid Act's EPSDT provisions violate rights that Medicaid recipients may enforce pursuant to 42 U.S.C. § 1983? *See* 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Linda Frew, as next friend of her minor child, Carla Frew,

Maria Ayala, as next friend of her minor children, Christopher Arizola, Leonard Jimenez and Joseph Veliz,

Mary Fischer, as next friend of her minor child, Tyrone T. Edwards,

Mary Jane Garza, as next friend of her minor children, Hilary Garza and Sarah Renea Garza,

Charlotte Garvin as next friend of her minor children, Johnny Martinez, Brooklyn Garvin and BreAnna Garvin, and

Shannon Garcia, as next friend of her minor children, Andrew Garcia, Marisha Garcia, Stephen Sanchez and Allison Sanchez

Respondents, all sued in their official capacities only:

Don Gilbert, Texas Commissioner of Health and Human Services,

Linda Wertz, Texas State Medicaid Director,

Eduardo Sanchez, MD, Texas Commissioner of Health,

Bridgett Cook, employee of Texas Department of Health, and

Susan Penfield, MD, employee of Texas Department of Health

Note of Explanation: The style of this case in the district court is *Frew v. Gilbert*; in the court of appeals the style is *Frazar v. Gilbert*. Plaintiff Frazar is not before this Court because the district court voluntarily dismissed her in 1994.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties to the Proceeding Below	ii
Table of Contents	iv
Table of Cited Authorities	viii
Table of Appendices	xiv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
A. Consent Decree	3
B. District Court Ruling	4
C. Court of Appeals Ruling	6
Reasons for Granting the Petition	7
I. State Officials Waive Eleventh Amendment Immunity By Agreeing To — and Voluntarily Urging The District Court To Adopt — A Consent Decree That: (1) Is Based On Federal Law; (2) Specifically Provides For The District Court's Ongoing Supervision Of The Officials' Decree Compliance And; (3) By Its Own Terms Creates "Mandatory, *Enforceable*" Obligations.	8

Contents

	Page
A. Many Courts Of Appeals Disagree With The Fifth Circuit's Conclusion That State Officials Do Not Waive Eleventh Amendment Immunity By Urging Entry of Consent Decrees.	8
B. Lower Courts Need To Know When Consent Decrees Can Be Enforced Against State Officials.	10
C. *Gunter* and *Lapides* Bar State Officials From Urging Entry Of A Consent Decree And Later Claiming That The Eleventh Amendment Prohibits Decree Enforcement.	11
D. *Lapides* Bars State Officials From Reviving Immunity After They Have Waived It.	13
II. A District Court's Jurisdiction To Enter And Enforce A Consent Decree Does Not Depend On Whether Violations Of The Decree Are Also Violations Of Federal Rights.	14
A. Many Courts Of Appeals Disagree With The Fifth Circuit's Decision That A District Court Must Rely On Its Inherent Jurisdiction And Find A Violation Of Remediable Rights To Enforce A Consent Decree.	14

Contents

	Page
B. The Eleventh Amendment Is Not Offended When Federal Courts Issue Prospective Remedial Orders To Remedy Violations Of Consent Decrees That Also Provide Prospective Relief From Ongoing Violations Of Federal Law. ..	18
C. The Fifth Circuit's Analysis Improperly Limits The Scope Of Injunctive Relief In Cases Involving State Officials.	18
D. To Require Proof of Violation of Rights Remediable Via § 1983 Conflicts With *Verizon*'s Conclusion That Eleventh Amendment Analysis Does Not Include The Merits Of A Case.	20
III. State Officials' Failure To Provide Services Required By The EPSDT Provisions Violates Rights That Medicaid Recipients May Enforce Pursuant To 42 U.S.C. § 1983.	21
A. The Courts Of Appeals Disagree About The Extent Of EPSDT Rights	23
B. Children's EPSDT Rights Are Violated When They Cannot Get Health Care Guaranteed To Them By The Medicaid Act.	24
C. EPSDT Participation Reports Do Not Preclude Enforcement of EPSDT Rights.	26

Contents

	Page
i. The Secretary's Reports and Participation Rates Are Not Before the Court.	26
ii. *Blessing*'s "Substantial Compliance" Analysis Does Not Apply to EPSDT Rights.	26
Conclusion	29

TABLE OF CITED AUTHORITIES

Page

Cases:

Alexander v. Hill, 707 F.2d 780 (4th Cir.), *cert. denied*, 464 U.S. 874 (1983) 16

Antrican v. Buell, 158 F. Supp. 2d 663 (E.D.N. Car. 2001), *aff'd sub nom*, *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), *cert. denied*, No. 02-220 ..... 23, 25

Arkansas Med. Society, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993) 25

Blessing v. Freestone, 520 U.S. 329 (1997) 5, 21, 22, 23, 26, 27

Cannon v. University of Chicago, 441 U.S. 677 (1979) 27

Doe v. Chiles, 136 F.2d 709 (11th Cir. 1998), *appeal after remand, sub nom Doe v Bush*, 261 F.3d 1037 (11th Cir. 2001) 25

Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989) 15, 17

Evans v. Jeff D., 475 U.S. 717 (1986) 11

Evergreen Presbyterian Ministries v. Hood, 235 F.3d 908 (5th Cir. 2000) 25

Ex Parte Young, 209 U.S. 123 (1908) 5, 14, 16, 20

Page

Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 5, 7, 15, 18

Gardner v. State of New Jersey, 329 U.S. 565 (1947) 13

Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) 9

Gonzaga University v. Doe, __ U.S. __, 122 S. Ct. 2268 (2002) 21, 22, 27

Green v. Mansour, 474 U.S. 64 (1985) 18

Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906) 11

Hook v. State of Ariz. Dept. of Corrections, 972 F.2d 1012 (9th Cir. 1992) (*subsequent history omitted*) 10

Ibarra v. Texas Employment Commission, 823 F.2d 873 (5th Cir. 1987) 15

Idaho v. Coeur d'Alene, 521 U.S. 261 (1997) 21

King v. Smith, 392 U.S. 309 (1968) 22

Komyatti v. Bayh, 96 F.3d 955 (7th Cir. 1996) ... 10, 15, 17

Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989) 8, 9, 10, 15

Page

Lapides v. Bd. of Regents of Univ. System, 535 U.S. __, 122 S. Ct. 1640 (2002) 8, 10, 11, 12, 13, 20

Lawyer v. Department of Justice, 521 U.S. 567 (1997) 10, 18

Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir.) (*LelszI*), *rehearing en banc denied*, 815 F.2d 1034, (*LelszII*), *subsequent panel decision*, 824 F.2d 372, *cert. dismissed*, 483 U.S. 1057 (1987) 7, 15, 17

Marek v. Chesny, 473 U.S. 1 (1985) 11

Miller by Miller v. Whitburn, 10 F.3d 1315 (7th Cir. 1997) 23, 24

Milliken v. Bradley, 433 U.S. 267 (1977) 17, 19

Mitchell v. Com'n on Adult Entertainment Est., 12 F.3d 406 (3d Cir. 1993) 9

Mitchell v. Forsyth, 472 U.S. 511 (1985) 14

Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983) 23, 24, 25

Pediatric Specialty Care v. Ark. Human Services, 293 F.3d 472 (8th Cir. 2002) 23

Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984) 15

Page

Pereira by Pereira v. Kozlowski, 996 F.2d 723 (4th Cir. 1993) 23, 24

Pittman by Pope v. Sec'y of Florida Dep't. Of Health and Rehab. Services, 998 F.2d 887 (11th Cir.), *cert. denied*, 510 U.S. 1030 (1993) 24

Plyler v. Evatt, 924 F.2d 1321 (4th Cir. 1991) 17

Puerto Rico Aqueduct v. Metcalf & Eddy, 506 U.S. 139 (1993) 14

Rosen v. Tennessee Com'r of Finance and Admin., 288 F.3d 918 (6th Cir. 2002) 16, 20

Rufo v. Inmates of Suffolk County, 502 U.S. 367 (1992) 10, 17, 19

Spallone v. United States, 493 U.S. 265 (1990) ... 19

Stanton v. Bond, 504 F.2d 1246 (7th Cir. 1974) (subsequent history omitted) 24, 25

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 19

Terrazas v. Ramirez, 829 S.W.2d 712 (Tex. 1991) ... 12

United States v. Armour & Co., 402 U.S. 673 (1971) 10, 14

United States v. ITT Continental Baking Company, 420 U.S.223 (1975) 14

Page

United States v. United Shoe Machinery Corporation, 391 U.S. 244 (1968) 6

Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) 9

Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., __ U.S. __, 122 S. Ct. 1753 (2002) 20, 21

Walker v. City of Birmingham, 388 U.S. 307 (1967) 10

Westside Mothers v. Haveman, 289 F.3d 852 (6th Cir. 2002), *cert. pending*, No. 02-277 ..... i, 23-24

Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) 2, 25, 28

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381 (1998) 12

Wisconsin Hospital Ass'n v. Reivitz, 820 F.2d 863 (7th Cir. 1987) 16

Constitutional Provisions:

Eleventh Amendment ..... *passim*

Tex. Const. Art. 4, §22 12

Page

Statutory Provisions:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

42 U.S.C. § 609(8) 26

42 U.S.C. § 1320a-2 ..... 24, 25

42 U.S.C. § 1320a-10 ..... 24, 25

42 U.S.C. § 1396a(a)(8) 6, 25

42 U.S.C. § 1396a(a)(30)(A) 6, 25

42 U.S.C. § 1396a(a)(43) ..... i, 1, 2, 22, 26, 28

42 U.S.C. § 1396c 26, 28

42 U.S.C. § 1396d(r) ..... i, 1, 2, 22, 26, 28

42 U.S.C. § 1983 ..... *passim*

Rules:

Supreme Court Rule 10(a) 7

Supreme Court Rule 10(c) 7

Miscellaneous:

H.R. No. 101-247, 101st Cong., 1st Sess. 398 (1989), *reprinted in* 1989 U.S.C. CAN 2124 23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed July 24, 2002 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Texas, Paris Division Dated May 15, 2001 And Filed May 17, 2001 ..... 47a

Appendix C — Order Of The United States District Court For The Eastern District Of Texas, Paris Division Dated March 9, 2001 And Filed March 12, 2001 ..... 49a

Appendix D — Memorandum Opinion And Order Of The United States District Court For The Eastern District Of Texas, Paris Division Dated August 9, 2000 And Filed August 14, 2000 .... 54a

Appendix E — Constitutional And Statutory Provisions Involved 279a

Appendix F — Consent Decree Of Parties Filed February 20, 1996 ..... 288a

OPINIONS BELOW

The court of appeals' decision is reported at 300 F.3d 530 (5th Cir. 2002) and reprinted in Appendix A (hereinafter "App."). The district court's decision denying the Respondent State officials' motion to dismiss (filed May 17, 2001) is reprinted in App. B. The district court's decision permitting supplementation of the complaint (filed March 12, 2001) is reprinted in App. C. The district court's memorandum opinion finding violations of the consent decree is reported at 109 F. Supp. 2d 579 (E.D. Tex. 2000). The memorandum opinion and the district court's remedial order (both filed August 14, 2000) are reprinted in App. D. The parties' consent decree (filed February 20, 1996) is lodged with the Clerk (hereinafter "L.")

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 24, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution; 42 U.S.C. §§ 1396a(a)(43); 1396d(r) and 42 U.S.C. § 1983 are reprinted in App. E.

STATEMENT OF THE CASE

This Petition addresses the Fifth Circuit's refusal to permit enforcement of a consent decree in a case about the Medicaid Act's Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Program. In conflict with other courts of appeals, the Fifth Circuit improperly held that the Eleventh Amendment prohibits enforcement of the decree even though State officials voluntarily urged the entry of a prospective decree that: (1) is based on federal law; (2) creates enforceable obligations; and (3) specifically provides for judicial resolution of disputes about compliance.

When States accept federal Medicaid funds, they must follow federal Medicaid requirements. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990). EPSDT is a required service. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Through EPSDT, Congress created a practical approach to health care for indigent young Medicaid recipients. Medicaid officials must "provide for"

- informing all Medicaid recipients under the age of 21 about EPSDT and immunizations,
- providing or arranging for screens "in all cases where they are requested," and
- "arranging for (directly or through referral to appropriate agencies, organizations, or individuals)" all necessary corrective treatment.

42 U.S.C. §§ 1396a(a)(43)(A); (B); (C); 1396d(r).

The Petitioner mothers filed suit in 1993 because the officials were not providing the Petitioner children with EPSDT services. The complaint describes the officials' violations of the children's rights to: (1) information about EPSDT rights; (2) provision or arrangement of medical screens and dental, vision and hearing preventive services; and (3) provision or arrangement of necessary corrective treatment.

The district court had jurisdiction over the dispute. 28 U.S.C. § 1331. The children sought only prospective relief from State officials sued in their official capacities. 42 U.S.C. § 1983. In 1994, the district court certified the case as a class action.

This petition arises from the court of appeals' decision in two consolidated appeals. The first interlocutory appeal addresses enforcement of the consent decree. The second interlocutory appeal addresses the children's first supplemental complaint.

A. Consent Decree In 1994, after extensive discovery, the parties hoped to settle this case. The district court set an agreed schedule for negotiations. In January 1995, the parties proposed to the court an initial settlement. They also reported that the officials wished to "inform appropriate legislative and executive offices of the State of the content and potential financial implications of this agreement. The Defendants [did] not feel that they [could] give their final approval until this discussion [took] place." 3R888.[1] Negotiations continued for several more months. The officials had time to obtain approval and to reconsider the settlement to be sure that it reflected their discretion and judgment.

In July 1995, the parties made a final proposal to the court to settle most issues presented by this litigation. They also noted that disputed issues remained. For example, although the parties noted that the United States Secretary of Health and Human Services (hereinafter "Secretary") had established participation goals for EPSDT medical screens, the decree does not resolve disputes about meeting those goals. 3R902.

In December 1995, the district court took evidence about whether to adopt the proposed settlement as the court's decree. During opening statements, the Attorney General recommended "that the Court sign this proposed consent decree." 15R12;17. He noted that the decree was negotiated within the framework of federal Medicaid law. 15R13;16-7. All three of the State officials' witnesses testified in favor of entry of the decree.

In February 1996, the district court found that the proposed settlement was fair, reasonable and adequate. The court entered the settlement as its decree. *See, e.g.*, App. at 57a. The officials did not appeal.

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1. The children refer to the record as _R_. The first number refers to the volume; the second number refers to the page. If citation to a line is possible, the line citation follows the page citation. The two are separated by a semicolon.

The consent decree allows judicial relief from disputes about the officials' compliance with the order. If disputes arise, "the parties may request relief from [the] Court." L.; ¶303. The officials also must file quarterly monitoring reports to inform the district court of the "status of each activity" required by the decree. L.; ¶¶306-7.

Further, even though the officials did not admit liability, L.; ¶301, they urged the district court to enter a decree that could be enforced. For example, the term "will," used throughout the decree, "creates a mandatory, *enforceable obligation*." L.; ¶302 (emphasis added). Finally, the decree notes that the "agreements negotiated by the parties which led to [the decree] were reached within the framework of federal law related to the EPSDT and Medicaid programs. . . ." L.; ¶308.

Although the officials violated many aspects of the decree, they made some efforts to comply. For several years, they filed quarterly reports about their efforts to follow the court's order. L.; ¶¶306-7.

In 1998, the children moved to enforce several of the decree's provisions. The officials did not file a motion to dissolve or modify the decree.[2] Indeed, they "readily" admitted in briefing before the district court that "some portions of the Decree directly relate to the Federal statutory scheme for the EPSDT program and to the right created by Congress. . . ." 11R343. They conceded that "[t]hese entitlements *can be enforced* by Federal Courts who have authority to prospectively enjoin State officials for violating those rights." 11R349 (emphasis added). *See* App. at 247a-248a.

B. District Court Ruling After a five-day hearing in March 2000, the district court ruled that it had jurisdiction to enforce the decree. First, the court ruled that the case falls within the

2. The court of appeals incorrectly found that the district court refused to modify the consent decree. App. at 3a. No one asked the district court to modify the decree.

Ex Parte Young exception to the Eleventh Amendment because it seeks prospective relief from State officials' violation of federal law. App. at 246a n.197. Second, the district court noted that the State officials did not object to the entry of the consent decree. App. at 247a. Sovereign immunity did not bar decree enforcement because the decree was properly entered and it vindicated federal rights. App. at 247a-261a; *See Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). Finally, the court concluded that the Medicaid Act's EPSDT provisions create rights that may be enforced pursuant to § 1983. *See Blessing v. Freestone*, 520 U.S. 329 (1997). App. at 234a-244a.

The district court also found that the officials were violating most of the decree provisions cited by the children. The record is filled with examples of many children who could not obtain required EPSDT services. For example, a two-year old with cerebral palsy could not even hold his head up — let alone walk — because he did not receive proper physical therapy. App. at 163a-164a. For want of a hearing test to diagnose his deafness, a seven-year old class member was about to be placed in special education because he was incorrectly perceived to have learning disabilities. App. at 88a n.32; 17R171;4 to 172;22. Another youth had to wait eight weeks for orthopedic care for a broken arm. App. at 149a n.98. Children in managed care could not even obtain emergency care for severe and prolonged asthma attacks of a critical nature, or dangerous episodes of vomiting and fever that resulted in dehydration requiring intravenous fluids. App. at 157a-158a.

Other evidence also shows that the children's EPSDT rights are violated. Even though they are entitled to information about EPSDT, "[o]verwhelming evidence . . . demonstrat[es] that large numbers of class members do not know about" EPSDT. App. at 61a. More than one million Petitioner-children get no dental care at all. App. at 92a. As

a result, they "crowd emergency rooms in hospitals, suffering from acute forms of dental disease that, while easily preventable, often lead to such health complications as serious oral infections, dehydration, fever and malnourishment stemming from the inability to eat." App. at 91a.

After finding that the officials were violating the decree, the district court chose to "require 'relatively mild sanctions as a first resort,'" so it ordered the officials to propose "corrective action plans to remedy each violation of the decree." App. at 276a-277a, *citing United States v. United Shoe Machinery Corporation*, 391 U.S. 244, 249-50 (1968). As with the decree itself, the district court's remedial order only provides prospective relief.

The officials appealed.[3]

C. Court of Appeals Ruling On July 24, 2002, the court of appeals vacated the district court's orders in both appeals and remanded for further proceedings. App. at 46a. The court held that the Eleventh Amendment deprived the district court of jurisdiction to enforce the consent decree. The Fifth Circuit found that the State officials did not waive Eleventh Amendment immunity by their litigation conduct, such as urging the district court to enter the decree and attempting to comply with it. App. at 39a-42a. Further, the Fifth Circuit held that the Eleventh Amendment requires the district court to "fall back on its

3. The second interlocutory appeal concerns the children's first supplemental complaint. It asserts the new claim that the officials do not provide the children with dental care and services that are available at least to the extent that they are available to the general population in the geographic area. 42 U.S.C. § 1396a(a)(30)(A). It further claims that the officials do not furnish dental care to the children with reasonable promptness. 42 U.S.C. § 1396a(a)(8). After allowing the children to supplement their complaint, App. at 52a, on May 17, 2001, the district court denied the officials' motion to dismiss the first supplemental complaint. App. at 48a. The officials appealed.

inherent jurisdiction" to enforce a consent decree against State officials. App. at 24a. "Before the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." App. at 27a-28a. The court of appeals did not apply the standards for entering consent decrees to decide whether the decree could be enforced. App. at 24a-27a; *see Firefighters*, 478 U.S. at 525. Instead, the court extended the reasoning of its controversial decision in *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir.) (*LelszI*), *rehearing en banc denied*, 815 F.2d 1034, (*LelszII*), *subsequent panel decision*, 824 F.2d 372, *cert. dismissed*, 483 U.S. 1057 (1987), to hold for the first time that the Eleventh Amendment bars enforcement against State officials of a consent decree based on federal law. Finally, the court of appeals held that, although the Medicaid Act's EPSDT provisions may create enforceable rights, proof that children did not receive EPSDT information, screens and services did not prove violations of those rights. App. at 33a-39a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision about consent decree enforcement conflicts with decisions of other United States courts of appeals as well as this Court's analysis in other cases. Also, the court's decision concerning the violation of EPSDT rights creates confusion and conflict among the courts of appeals. Supreme Court Rule 10(a).

Moreover, this petition presents important questions about federal courts' jurisdiction to enforce consent decrees based on federal law and entered into by State officials. Also, this petition presents an important question of federal law about the use of 42 U.S.C. § 1983 to remedy violations of EPSDT rights. These questions have not been resolved by this Court, but should be. Finally, the Fifth Circuit's decision conflicts with decisions of this Court. Supreme Court Rule 10(c).

I. State Officials Waive Eleventh Amendment Immunity By Agreeing To — and Voluntarily Urging The District Court To Adopt — A Consent Decree That: (1) Is Based On Federal Law; (2) Specifically Provides For The District Court's Ongoing Supervision Of The Officials' Decree Compliance And; (3) By Its Own Terms Creates "Mandatory, *Enforceable*" Obligations.

The Eleventh Amendment does not immunize State officials from enforcement of a consent decree that they urge a district court to enter. To hold otherwise would be anomalous and inconsistent because State officials could "both (1) . . . invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) . . . claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Lapides v. Bd. of Regents of Univ. System*, 535 U.S. __, 122 S. Ct. 1640, 1643 (2002).

A. Many Courts Of Appeals Disagree With The Fifth Circuit's Conclusion That State Officials Do Not Waive Eleventh Amendment Immunity By Urging Entry of Consent Decrees.

This Court's review is necessary to prevent confusion and conflict among the lower courts about when State officials waive their Eleventh Amendment immunity so that consent decrees may be enforced against them. The First, Second, Third, Seventh and Ninth Circuit Courts of Appeals disagree with the Fifth Circuit's conclusion that State officials do not waive their Eleventh Amendment immunity by urging the district court to enter a consent decree. For example, the Second Circuit holds that State officials waive Eleventh Amendment immunity simply by agreeing to a consent decree. *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (decree modification denied).

Further, other courts disagree with the Fifth Circuit's conclusion that State officials do not waive immunity when they: (1) urge the district court to enter the decree; (2) do not appeal from the entry of the decree; and (3) attempt to follow it.[4] For example, in *Mitchell v. Com'n on Adult Entertainment Est.*, 12 F.3d 406, 408 (3d Cir. 1993) (costs), a Delaware Commission settled a licensing dispute. The Commission "agreed to forego an appeal and accept the district court's judgment" in return for an agreement that the plaintiff also would not appeal. "To say that the Commission can now collaterally attack the [consent] judgment on eleventh amendment grounds would be the same as saying that, despite the settlement it voluntarily entered, the Commission was free at any time thereafter to disavow the judgment on eleventh amendment grounds. . . ." *Id.* at 409; *see also Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) (attorney's fees), *subsequent history omitted*; *Vecchione v. Wohlgemuth*, 558 F.2d 150, 158-59 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (decree vacation denied).

Unlike the Fifth Circuit, other courts of appeals recognize that it is unjust to allow State officials to bargain for consent orders and later urge that the courts are powerless to enforce them. Once State officials decide to pursue entry of a decree instead of trial, they cannot "'evade an integral portion of that decree. . . .' Such a result would impugn the integrity of the court and allow the [official] to avoid his bargained-for obligations — while retaining the benefits of concessions he obtained on other issues during the negotiations." *Kozlowski*, 871 F.2d at 245 (citation omitted in original). Further, to allow State officials to disobey a decree would turn the court's proper order into "a mere advisory opinion." *Vecchione*, 558 F.2d at 159.

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4. In this case, the officials filed reports to try to convince the district court that they had complied with the decree. L.; ¶¶306-7.

Moreover, unlike the Fifth Circuit, several courts of appeals only permit State officials to escape decree obligations by obtaining modification or dissolution of the decree. They cannot rely on the Eleventh Amendment to "simply ignore the consent decree." *Hook v. State of Ariz. Dept. of Corrections*, 972 F.2d 1012, 1016 (9th Cir. 1992) (*subsequent history omitted*); *see also Komyatti v. Bayh*, 96 F.3d 955, 962-63 (7th Cir. 1996) (decree enforcement); *Kozlowski*, 871 F.2d at 246-49; *Rufo v. Inmates of Suffolk County*, 502 U.S. 367, 389 (1992); App at 262a n.203.[5] This rule has the beneficial result of allowing district courts to manage the orders that State officials urge should be entered, whether by enforcing decrees or modifying them as allowed by the Rules of Civil Procedure.

B. Lower Courts Need To Know When Consent Decrees Can Be Enforced Against State Officials.

This case presents an important question about the lower courts' ability to enforce consent decrees that State officials urge federal courts to enter. This question comes up frequently. State officials often ask federal courts to enter agreed orders to resolve disputes in many areas of the law. *See, e.g., Rufo*, 502 U.S. 367.

"[J]urisdictional rules should be clear." *Lapides*, 122 S. Ct. at 1645. The lower courts and parties to litigation need clear rules to govern enforcement of consent decrees against State officials. Settling plaintiffs and defendants always give up things "that they might have won had they proceeded with the litigation," *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), including the right to demand trial. *Lawyer v. Department of Justice*, 521 U.S. 567, 580 (1997). Parties to settlement negotiations need to know whether a federal court

5. Even injunctions that may "be subject to substantial constitutional question" must be obeyed unless they are modified or dissolved. *Walker v. City of Birmingham*, 388 U.S. 307, 317-19 (1967).

will be able to enforce consent decrees against State officials so they can decide whether what they are getting in settlement is worth what they are giving up.

Since "settlements rather than litigation will serve the interests of plaintiffs *as well as defendants*." *Evans v. Jeff D.*, 475 U.S. 717, 733 (1986), *quoting Marek v. Chesny*, 473 U.S. 1, 10 (1985) (emphasis added), this Court should establish clear and fair rules that allow State officials to enter into consent decrees that can be enforced. When State officials urge the district court to enter a consent decree that specifically allows for the district court's ongoing supervision of decree compliance, they waive immunity because they "voluntarily invoked the federal court's jurisdiction." *Lapides*, 122 S. Ct. at 1644. They must not be allowed to misuse the Eleventh Amendment later by arguing that the court cannot enforce an order that they urged should be entered. *Id.*

C. *Gunter* and *Lapides* Bar State Officials From Urging Entry Of A Consent Decree And Later Claiming That The Eleventh Amendment Prohibits Decree Enforcement.

"[T]he proposition that the Eleventh Amendment . . . control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, *is not open for discussion*." *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 292 (1906), *followed in Lapides*, 122 S. Ct. at 1646 (emphasis added). Affirmative litigation conduct can waive Eleventh Amendment immunity. *Lapides*, 122 S. Ct. at 1643. In *Lapides*, the State of Georgia "voluntarily invoked the federal court's jurisdiction" by agreeing to remove a case to federal court. *Id.* at 1644. By so doing, the State waived immunity, even though it was "brought involuntarily into the case as a defendant," *Id.*, and even though the plaintiff's claims were based on State law. *Id.* at 1643. Also, the State

waived immunity even though at the time of removal, it did not expressly say that it was waiving Eleventh Amendment immunity. The act of removal itself effectuated the waiver because it was clear. *Id.* at 1644. Finally, as a matter of federal law, immunity was waived even though a State statute prohibited the Attorney General from waiving immunity. *Id.* at 1645. It was fair for the Attorney General's litigation conduct to bind the State because the State legislature had authorized the Attorney General to represent the State in court. *Id.*[6]

Lapides' logic requires the enforcement of a consent decree when State officials voluntarily submit the decree and its enforcement to judicial determination. *Id.* at 1644. In this case, nothing compelled the officials to urge the district court to enter the decree — which they did unanimously. As in all settlement negotiations, the officials had the "unilateral right to block" the agreement that resulted in the decree. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 395-96 (1998) (Kennedy, J., concurring)

Instead of opposing agreed relief, the officials in this case embraced it. After informing the appropriate legislators and executive officers, the officials urged the district court to enter a consent decree that specifically allows the children to "request relief from the Court" if the "Defendants' future activities . . . [do not] comport with the terms and intent of this Decree." L. at ¶303. They further urged the district court to enter a decree that "creates . . . mandatory, *enforceable* obligation[s]." L.; ¶302 (emphasis added).

By affirmatively urging the district court to adopt a decree that provides for judicial relief, the officials invoked the court's jurisdiction, "thereby waiv[ing] any immunity

6. As in *Lapides*, the Texas Attorney General is authorized to represent the State in court and to "propose a settlement agreement." *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991); Tex. Const. Art. 4, § 22.

which [they] otherwise might have had." *Gardner v. State of New Jersey*, 329 U.S. 565, 574 (1947), *followed in Lapides*, 122 S. Ct. at 1646.[7] This rule "makes sense" because in the litigation context, the Eleventh Amendment should honor "the judicial need to avoid inconsistency, anomaly, and unfairness." *Lapides*, 122 S. Ct. at 1644.

D. *Lapides* Bars State Officials From Reviving Immunity After They Have Waived It.

Despite *Lapides*, the court of appeals held that the officials did not clearly waive their immunity when they urged entry of the decree because later the officials raised an "Eleventh Amendment defense to the enforcement of the decree." App. at 41a-42a. This Court should not allow State officials to trivialize the Amendment by selectively asserting "immunity" to achieve litigation advantages. 122 S. Ct. at 1644.

As in this case, the *Lapides* defendant also disavowed the protection of the Eleventh Amendment and then sought to revive immunity later in the case. 122 S. Ct. at 1642. In *Lapides*, this Court rightly prohibited the defendant from reasserting the Eleventh Amendment immunity that it had already waived. The Court should follow *Lapides* in this case. The Court should not allow State officials to obtain concessions during settlement negotiations and then abuse the cloak of immunity to avoid obligations that they promised the district court they would assume.

Further, the court of appeals also incorrectly concluded that the officials in this case did not unequivocally waive the Eleventh Amendment because the "consent decree

7. The officials' actions after the decree was entered further indicate that they assented to the court's jurisdiction over them. They did not appeal from the entry of the decree. To assist the district court to determine if they were complying with the decree, they filed quarterly reports about their efforts for several years. L.; ¶ 306.

expressly states in paragraph 301 that 'Defendants do not concede liability.'" App. at 41a. The officials' refusal to admit liability, however, is not the same as asserting Eleventh Amendment immunity. The Eleventh Amendment provides immunity from suit, which is not "a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Puerto Rico Aqueduct v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993). Since decree terms must be given their natural meanings, *Armour*, 402 U.S. at 678, including "technical meaning[s]," *United States v. ITT Continental Baking Company*, 420 U.S. 223, 238 (1975), the court of appeals should have concluded that the parties meant what they said. While the officials did not concede liability, they *did* agree to a decree that could be enforced against them.

II. A District Court's Jurisdiction To Enter And Enforce A Consent Decree Does Not Depend On Whether Violations Of The Decree Are Also Violations Of Federal Rights.

This case presents important questions about the lower courts' jurisdiction to enforce consent decrees that provide prospective relief from State officials. *See Ex Parte Young*, 209 U.S. 123 (1908). Contrary to the Fifth Circuit's decision in this case, if the district court has jurisdiction to enter a consent decree, it also has jurisdiction to enforce it.

A. Many Courts Of Appeals Disagree With The Fifth Circuit's Decision That A District Court Must Rely On Its Inherent Jurisdiction And Find A Violation Of Remediable Rights To Enforce A Consent Decree.

The Courts of Appeals for the Second, Fourth, Sixth, Seventh and Tenth Circuits disagree with the Fifth Circuit's reasoning in this case. The Fifth Circuit relies on two concepts to hold that the Eleventh Amendment prohibits the district court from enforcing the consent decree here.

First, several courts of appeals disagree with the Fifth Circuit's conclusion that a federal court's jurisdiction to enforce a consent decree differs from its jurisdiction to enter a decree. App. at 21a-22a; 27a. To reach this decision, the Fifth Circuit relied on *LelszI*, 807 F.2d at 1252. *LelszI* addresses enforcement of a consent decree concerning treatment and rehabilitation in a state facility for the mentally retarded. 807 F.2d at 1245-6. The Eleventh Amendment barred enforcement of the decree because it was founded in state law. *LelszI*, 807 F.2d at 1247, *citing*, *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1984).[8] The Fifth Circuit decision here extends *LelszI* to a consent decree that was "reached within the framework of federal law related to the EPSDT and Medicaid programs. . . ." L.; ¶308; App. at 27a.

As the Fifth Circuit notes, other courts of appeals find the distinction between jurisdiction to enter a decree and jurisdiction to enforce it "'utterly indefensible' or 'untenable.'" App. at 27a. *See also* App. at 257a-260a. As the Second Circuit says, "[i]f a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989). *See also Duran v. Carruthers*, 885 F.2d 1485, 1490-91 (10th Cir. 1989) (motion to vacate decree denied). A properly entered decree can even be enforced by contempt. *Komyatti v. Bayh*, 96 F.3d 955, 963 (7th Cir. 1996).

The Seventh Circuit agrees that the Eleventh Amendment does not prevent enforcement of a decree based on federal law. "[A] provision in a validly-entered consent decree is an obligation on State officials to conform their conduct to federal law." *Komyatti*, 96 F.3d at 960-61, *quoting*, *Firefighters*, 478 U.S. at 525.

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8. Until the Fifth Circuit's decision in this case, *Lelsz* and its rationale were limited to consent decrees based on state law or no law. *Ibarra v. Texas Employment Commission*, 823 F.2d 873, 877 (5th Cir. 1987); *see also* App. at 252a-256a.

Even more pertinently, the Seventh Circuit concludes that the Eleventh Amendment does not prohibit enforcement of a consent decree based on the Medicaid Act's requirements. *Wisconsin Hospital Ass'n v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (per J. Posner). "The decree did not engage the Eleventh Amendment. . . . The decree settled a genuine, noncollusive case that was within the exception to the Eleventh Amendment that *Ex Parte Young* created." *Id.* at 868. The same is true in this case.

Further, since the children seek protection from ongoing violations of the federal Medicaid Act, the decree here arises in a classic *Ex parte Young* case. The decree and the district court's order enforcing it provide only prospective relief, exactly as *Ex parte Young* envisions. The Seventh and Fourth Circuits both hold that the Eleventh Amendment does not prohibit forward-looking orders to enforce consent decrees in cases about Medicaid. *Reivitz*, 820 F.2d at 868; *Alexander v. Hill*, 707 F.2d 780, 783-4 (4th Cir.), *cert. denied*, 464 U.S. 874 (1983).[9]

Second, the Fifth Circuit holds that to overcome the Eleventh Amendment, plaintiffs must prove that a violation of the decree is also a violation of rights remediable pursuant to § 1983. App. at 27a-28a. Several courts of appeals disagree with this conclusion and its reasoning. For example, in *Rosen v. Tennessee Com'r of Finance and Admin.*, 288 F.3d 918, 925 (6th Cir. 2002), a federal court properly enforced an agreed order based on the Medicaid Act, even though it had not had "the opportunity to adjudicate on the merits" a § 1983 case against state officials.

The Fifth Circuit's rule significantly restricts the scope of remedies that can be enforced against State officials — in

9. The remedial order in this case only requires prospective relief from the State officials, i.e., the development of plans to remedy their violations of the decree.

conflict with rules established by other courts of appeals.[10] According to the Seventh Circuit, "[i]t is well established that consent decrees may embody conditions beyond those imposed directly by [federal law] itself . . . [when] the condition . . . is related to elimination of the condition that is alleged to offend" federal law. *Komyatti*, 96 F.3d at 959 (*citing Rufo*, 502 U.S. at 389). Consent decrees rarely require the "bare minimum" required by federal law; they generally contain provisions that require more than the minima. *Id.*

The Tenth Circuit agrees. When a consent decree "ordered state officials to conform their conduct to federal law, and the provisions of the decree . . . tend to vindicate those rights," the decree can be enforced. *Duran*, 885 F.2d at 1491. A decree can be enforced against State officials even if its provisions do more than achieve the minimal requirements of federal law. *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991), *cited with approval in Rufo*, 502 U.S. at 390. To hold otherwise would require a full trial on the merits "every time an effort was made . . . to enforce . . . the decree by judicial action." *Plyler*, 924 F.2d at 1327.

10. When the evenly divided Fifth Circuit denied review by the whole court of *LelszI*, the dissent noted that the decision improperly limits the enforcement of consent decree remedies.

> There can be no doubt that a federal court, to remedy federal violations, may require state officers to adopt programs that, absent the federal violations, were not guaranteed to the plaintiffs by the Constitution or federal statute. The remedial program must only be tailored to cure the condition that offends federal law.

Lelsz v. Kavanagh, 815 F.2d 1034, 1036-37 (5th Cir. 1987) (dissent from denial of rehearing en banc) (*subsequent history omitted*), *citing Milliken v. Bradley*, 433 U.S. 267 (1977) (*LelszII*).

B. The Eleventh Amendment Is Not Offended When Federal Courts Issue Prospective Remedial Orders To Remedy Violations Of Consent Decrees That Also Provide Prospective Relief From Ongoing Violations Of Federal Law.

To preserve the supremacy of federal law, federal courts must be able to order prospective relief from State officials' ongoing violations of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). When State officials propose to settle disputes about violations of federal law, federal courts may approve those settlements without a formal adjudication that the officials violated the law. *Lawyer*, 512 U.S. at 578-80. It would indeed be anomalous if federal courts could not enforce properly approved agreed orders without finding that State officials have violated the law — a finding that everyone agreed was not necessary.

Importantly, the rules for proper entry of consent decrees ensure that the Eleventh Amendment is not offended in cases that are based on federal law. To be properly entered, a decree "must (1) 'spring from and serve to resolve a dispute within the court's subject-matter jurisdiction'; (2) 'come within the general scope of the case made by the pleadings'; and (3) 'further the objectives of the law upon which the complaint was based.'" *Firefighters*, 478 U.S. at 525. The decree in this case meets the *Firefighters* test, so the Eleventh Amendment does not bar enforcement. App. at 260a-261a.

C. The Fifth Circuit's Analysis Improperly Limits The Scope Of Injunctive Relief In Cases Involving State Officials.

The Fifth Circuit's approach unduly restricts the remedies that should be available — and enforceable — when State officials agree to them. Consent decrees may do more than merely order State officials to obey EPSDT law. "[A]lmost

any affirmative decree beyond a directive to obey the [law] necessarily does that." *Rufo*, 502 U.S. at 389.[11] If a decree's remedies cannot be enforced unless violation of the decree also violates Medicaid rights, then the parties can gain nothing by entering into a consent decree. This limit prevents parties to federal litigation — including State officials — from agreeing to nuanced remedies that are acceptable to all of them.

Further, federal courts do — and should — have plenary power to enter and enforce injunctions. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). Although subject to review for abuse of discretion, federal courts have broad and flexible power to issue injunctions with sufficient specificity to resolve disputes. *Spallone v. United States*, 493 U.S. 265, 273-76 (1990); *see also Milliken*, 433 U.S. at 281-82.[12] For example, in disputes about segregated schools, federal courts may order remedial education programs, special in-service teacher training, changes in student testing programs or even suspension of testing. *Id.* at 282-88.[13] These remedies are proper even though their absence does not violate equal protection requirements. They are appropriate because they remedy the consequences of unlawful actions. *Id.* at 288.

When using their power to fashion injunctive relief by court order (instead of by agreement), federal courts must respect State officials' exercise of their discretion to the extent possible. *Milliken*, 433 U.S. at 280-81. It would not "make

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11. The *Rufo* defendants included a State official. 502 U.S. at 372.

12. The *Milliken* defendants included State officials. Defendant Milliken himself was the governor of Michigan. 433 U.S. at 267-69.

13. It does not offend the Eleventh Amendment to require State officials to contribute to the costs of these remedial programs. *Milliken*, 433 U.S. at 288-90.

sense" for federal courts to be without jurisdiction to enforce a consent decree that already represents and incorporates the officials' discretion.

Further, once the district court found that the officials were violating sections of the consent decree, the court ordered a remedy designed to respect the officials' discretion. Instead of fashioning its own remedy for decree violations, the district court ordered the defendants to propose remedial plans. App. at 277a. This approach allows the district court to incorporate the officials' judgment into its prospective remedial orders.[14]

Finally, jurisdictional rules should "make sense." *Lapides*, 122 S. Ct. at 1244. To be fair, *Lapides* prohibits a defendant from removing a case to federal court, having it dismissed because of the Eleventh Amendment, seeking removal again, requesting dismissal again, and on and on *ad infinitum*. In the context of consent decrees, it would not "make sense" to allow State officials to urge entry of a decree to avoid trial, and then force trial on the merits before the plaintiffs could seek relief from a decree violation — and possibly yet another trial on the merits in the event of another decree violation.

D. To Require Proof of Violation of Rights Remediable Via § 1983 Conflicts With *Verizon*'s Conclusion That Eleventh Amendment Analysis Does Not Include The Merits Of A Case.

Eleventh Amendment analysis "*does not include an analysis of the merits*." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, __ U.S. __, 122 S. Ct. 1753, 1761 (2002) (emphasis added). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court

14. Other courts properly take more specific approaches to enforcing agreed decrees. *See, e.g., Rosen*, 288 F.3d at 924-5 (agreed order concerning Medicaid Act).

need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 1760, *quoting*, *Idaho v. Coeur d'Alene*, 521 U.S. 261, 296 (1997) (O'Connor, J. concurring.)

Despite *Verizon*, the Fifth Circuit held that to avoid the Eleventh Amendment's bar to jurisdiction, a plaintiff must prove that a violation of a consent decree is also a violation of *rights* remediable through § 1983. The Fifth Circuit's analysis conflicts with *Verizon*, which establishes that Eleventh Amendment analysis does *not* address the merits of a case, i.e., whether rights have been violated.

III. State Officials' Failure To Provide Services Required By The EPSDT Provisions Violates Rights That Medicaid Recipients May Enforce Pursuant To 42 U.S.C. § 1983.

This case presents an important question about whether millions of this country's children are entitled to actually receive the health care services that Congress has promised them, and that all of the States have agreed to provide. Further, this case presents an important question about the nature of rights granted by the Medicaid Act and other federal statutes.

To determine if a federal statute creates rights subject to enforcement, courts must determine "whether Congress *intended to create a federal right*." *Gonzaga University v. Doe*, __ U.S. __, 122 S. Ct. 2268, 1275 (2002) (original emphasis). The "text and structure of a statute" determine if Congress intended to "confer individual rights upon a class of beneficiaries." *Id.* at 2276-77. In this regard, *Gonzaga* amplifies the first prong in a three prong test used to determine if Congress created a right subject to § 1983 enforcement. *Blessing v. Freestone*, 520 U.S. 329 (1997). In other regards, *Gonzaga* reaffirms the *Blessing* test. *Gonzaga*, 122 S. Ct. at 2274.

As an initial matter, the EPSDT provisions — independent of any other sections of the Medicaid Act — meet the *Gonzaga-Blessing* test for whether a statute creates enforceable rights. First, § 1396a(a)(43) identifies very clearly the class of EPSDT beneficiaries. They are "all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance." 42 U.S.C. § 1396a(a)(43)(A). The same section of the Act also identifies the individual rights that Congress intended to confer upon this class of beneficiaries. The rights include:

- information from state officials about the availability of EPSDT services and immunizations. 42 U.S.C. § 1396a(a)(43)(A).
- provision or arrangement for "screening services in all cases where they are requested." 42 U.S.C. § 1396a(a)(43)(B). The statute defines the frequency and elements of screens, as well as dental, hearing and vision preventive services. 42 U.S.C. §§ 1396d(r)(1); (2); (3); (4).
- arrangements for "(directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services." 42 U.S.C. § 1396a(a)(43)(C). Medically needed corrective treatment includes "[s]uch other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services. . . ." 42 U.S.C. § 1396d(r)(5).

Sections 1396a(a)(43) and 1396d(r) clearly indicate that Congress intended the EPSDT provisions to benefit Medicaid recipients under the age of 21, i.e., the children in this case. When Congress defines a group of beneficiaries and specifies the services to be provided, Congress creates rights that may be remedied through § 1983. *See King v. Smith*, 392 U.S. 309, 317 (1968).

Further, the EPSDT provisions meet the second and third prongs of *Blessing*. *See, e.g., Pediatric Specialty Care v. Ark. Human Services*, 293 F.3d 472, 477-79 (8th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 863 (6th Cir. 2002), *cert. pending*, No. 02-277; *Miller by Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1997); *Pereira by Pereira v. Kozlowski*, 996 F.2d 723, 724-26 (4th Cir. 1993).

A. The Courts Of Appeals Disagree About The Extent Of EPSDT Rights.

Cases recently filed in this Court highlight the confusion among the courts of appeal about EPSDT rights. The Petition in *Odom v. Antrican*, No. 02-220 at 7 (hereinafter "*Antrican*"),[15] relies on this case to argue that the courts of appeals disagree about EPSDT rights. *See also Antrican* Reply at 4-5. Similarly, the Petition in *Haveman v. Westside Mothers*, No. 02-277 at 26 (hereinafter "*Westside Mothers*"), relies on this case to urge that a conflict exists about EPSDT rights.

Although the Petitioners in *Antrican* and *Westside Mothers* urge that there are no EPSDT rights, the courts of appeals for the Fourth, Sixth, Seventh, Eighth and Eleventh Circuits hold that EPSDT creates rights that may be enforced via § 1983.[16] *Pediatric Specialty Care v. Ark. Human Services*, 293 F.3d 472, 477-9 (8th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 862-3 (6th Cir. 2002),

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15. The Court denied a writ of certiorari in *Antrican* on October 21, 2002.

16. Further, Congress intends EPSDT to create rights enforceable pursuant to § 1983. When Congress strengthened the EPSDT requirements in 1989, Congress approved one federal court decision. H.R. No. 101-247, 101st Cong., 1st Sess. 398 at 399 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2124 at 2125. In that case, Texas children who qualified for Medicaid relied on § 1983 to enforce their EPSDT rights. *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983).

cert. pending, No. 02-277; *Miller by Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1997); *Pittman by Pope v. Sec'y of Florida Dep't. Of Health and Rehab. Services*, 998 F.2d 887 (11th Cir.), *cert. denied*, 510 U.S. 1030 (1993); *Pereira by Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993).

In this case, the Fifth Circuit implied that the EPSDT provisions may create rights, App. at 28a, and decided that indigent children who qualify for Medicaid do not have a right to actually receive the EPSDT information, screens and services that they need. App. at 33a-39a. This decision conflicts with decisions from the Fifth and Seventh Circuits, as well as Congress. 42 U.S.C. §§ 1320a-2; 1320a-10. *See below*.

Congress intends EPSDT to be "'an affirmative program aimed at reducing future Medicaid expense by detecting and remedying incipient dental problems. . . .'" *Mitchell*, 701 F.2d at 347 (citation omitted in original). *See also Stanton v. Bond*, 504 F.2d 1246, 1250 (7th Cir. 1974) (subsequent history omitted); *see also* 42 U.S.C. §§ 1320a-2; 1320a-10 (discussed below).

B. Children's EPSDT Rights Are Violated When They Cannot Get Health Care Guaranteed To Them By The Medicaid Act.

Even though the children proved that many of them cannot get health care that they need, the Fifth Circuit erroneously concluded that no facts showed violations of rights subject to § 1983 relief. In reaching this conclusion, the Fifth Circuit incorrectly focused its analysis on "the opening text of § 1396a(a) and § 1396a(a)(43) . . . [which] . . . only requir[e] that a state '*plan*' must '*provide for* . . .' meeting [EPSDT] requirements." App. at 29a-30a (original emphasis).

To the contrary, Congress emphasizes that "[i]n an action brought to enforce [provisions] of the Social Security Act, such provision is not to be deemed unenforceable because

of its inclusion in a section . . . requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §§ 1320a-2; 1320a-10. Sections 1320a-2 and § 1320a-10 reinstate "prior Supreme Court decisions" to set the "grounds for determining the availability of private rights of action to enforce State plan requirements."

This Court's 1990 decision in *Wilder*, 496 U.S. 498, predates the 1994 enactment of § 1320a-2 and § 1320a-10. In 1994, Congress reinstated *Wilder*'s holding that the Medicaid Act creates rights that may be enforced via § 1983, even though States must propose plans for federal approval.

Moreover, the Medicaid Act is not "a dead letter." *Wilder* 496 U.S. at 514. The reimbursement rates at issue in *Wilder* had to be "*actually* . . . reasonable and adequate." *Id.* at 515 (emphasis added).

In other words, it is not sufficient simply to have written EPSDT policies or State plan sections. EPSDT is "'aimed at . . . detecting and remedying incipient dental problems. . . .'" *Mitchell*, 701 F.2d at 347 (*citation omitted in original*). Children's health problems cannot be "remedied" unless children actually receive health care services. *See also Stanton*, 504 F.2d at 1250; *Antrican v. Buell*, 158 F. Supp. 2d 663, 672-73 (E.D.N.Car. 2001), *aff'd sub nom*, *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), *cert. denied*, No. 02-220.[17]

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17. Medicaid recipients may also enforce the reasonable promptness and equal access provisions of the Medicaid Act, raised in the children's first supplemental complaint. 42 U.S.C. §§ 1396a(a)(8); 1396a(a)(30)(A). Like EPSDT, the reasonable promptness provision also creates a right to actually receive Medicaid services with reasonable promptness, not just to promptness policies. *Doe v. Chiles*, 136 F.2d 709, 719, 721-22 (11th Cir. 1998), *appeal after remand, sub nom Doe v. Bush*, 261 F.3d 1037 (11th Cir. 2001) (denying contempt). Similarly, the equal access provision looks to actual access to health care. *Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908, 927-28, 930-34 (5th Cir. 2000); *Arkansas Med. Society, Inc. v. Reynolds*, 6 F.3d 519, 527 (8th Cir. 1993).

C. EPSDT Participation Reports Do Not Preclude Enforcement of EPSDT Rights.

The Court should review this case to determine an important question about Congress' intent to create rights. Despite § 1396a(a)(43)'s requirement of EPSDT information, screens and necessary corrective treatment for "*all*" Medicaid recipients under the age of twenty-one, the Fifth Circuit analogizes EPSDT participation reports to the substantial compliance standards found unenforceable in *Blessing*. App. at 31a-32a. App. at 30a-32a.[18]

i. The Secretary's Reports and Participation Rates Are Not Before the Court.

As an initial matter, the Secretary's reports and participation rates are not before this Court. While the complaint addresses the EPSDT reporting requirements, the parties did not agree to a decree based upon that claim. The decree does not rely on the EPSDT reporting requirements. Further, the parties specified that issues about the Secretary's participation goals remain in dispute and are not resolved by the decree. 3R902. Finally, the decree does not set participation rates.

ii. *Blessing*'s "Substantial Compliance" Analysis Does Not Apply to EPSDT Rights.

Blessing's "substantial compliance" analysis does not apply to EPSDT. First, the *Blessing* plaintiffs relied on 42 U.S.C. § 609(8), which allows the Secretary to reduce federal payments if a State does not substantially comply with the statute. In this case, the children do not rely on the parallel section of the Medicaid Act. 42 U.S.C. § 1396c.

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18. The reports include data about "results in attaining the participation goals" set by the Secretary under § 1396d(r). 42 U.S.C. § 1396a(a)(43)(D). The Secretary has only set participation goals for medical screens.

Second, the Secretary's participation reports and rates do not defeat the children's rights to EPSDT services. The fact that one section of a statute includes substantial compliance language does *not* defeat rights created by other sections of the same statute. *Blessing* itself concludes that although the substantial compliance requirements of Title IV-D of the Social Security Act did not create enforceable rights, other sections of the same statute might well bestow rights upon the *Blessing* plaintiffs. 520 U.S. at 345-46.

Third, Congress can use its spending power to create a statute that both vests enforcement power in the Secretary and grants enforceable rights to a group of individuals. Congress may seek to "avoid the use of federal resources" for programs that do not meet federal standards, and at the same time endow individuals with entitlements. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), *cited with approval in Gonzaga*, 122 S. Ct. at 2275. "The first purpose is generally served by the statutory procedure for the termination of federal financial support." *Cannon*, 441 U.S. at 704. Withholding federal funds, however, is "severe and often may not provide an appropriate means of accomplishing the second purpose. . . ." *Id.* at 704-05. Indeed, litigation by private parties is less disruptive than "a cutoff of all federal funds." *Id.* at 710 n.44. The children would be harmed tremendously if federal funds were withheld from the Texas Medicaid Program, because they would not be able to obtain health care.

The structure and text of the Medicaid Act indicate that Congress intended to vest individual EPSDT rights in children who qualify for Medicaid, 42 U.S.C. §§ 1396a(a)(43); 1396d(r), and also vest in the Secretary the authority to withhold federal funds in the event of "failure to comply substantially." 42 U.S.C. § 1396c. These separate sections of the Act serve separate purposes. The EPSDT provisions grant rights to "all" children and youth who qualify for Medicaid; § 1396c allows the Secretary to conserve federal resources by withholding funds if States do not substantially comply with Medicaid requirements.[19] *See also Wilder*, 496 U.S. 516-19 (Secretary's role exists together with rights subject to § 1983 enforcement).

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19. Section 1396a(a)(43)(D) is the only part of § 1396a(a)(43) that mentions the Secretary. This aspect of the text of the EPSDT provision suggests that Congress intended the reports required by § 1396a(a)(43)(D) to assist the Secretary in his duties.

CONCLUSION

Petitioners respectfully ask this Court to grant the petition for a writ of certiorari to resolve the conflicts among the courts of appeals concerning the important questions of federal law presented by this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 24, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-41112

JENEVA FRAZAR, Etc., ET AL.,

Plaintiffs,

LINDA FREW, as next friend of her minor child, Carla Frew; MARIA AYALA, as next friend of her minor children, Christopher Arizola, Leonard Jimenez and Joseph Veliz; MARY FISHER, as next friend of her minor child, Tyrone T. Edwards; MARY JANE GARZA, as next friend of her minor children, Hilary Garza and Sarah Renea Garza,

Plaintiffs-Appellees.

versus

DON GILBERT, Etc., ET AL.

DON GILBERT, Commissioner of the Texas Health and Human Services Commission in his official capacity; LINDA WERTZ, Texas State Medicaid Director; BRIDGETT COOK, employee of Texas Department of Health in official capacity; SUSAN PENFIELD, M.D., employee of the Texas Department of Health in official capacity; EDUARDO SANCHEZ, M.D., Texas Commissioner of Health,

Defendants-Appellants.

Appendix A

No. 01-40667

JENEVA FRAZAR, Etc., ET AL.,

Plaintiffs,

LINDA FREW, as next friend of her minor child, Carla Frew; CARLA FREW; MARIA AYALA, as next friend of her minor children, Christopher Arizola, Leonard Jimenez and Joseph Veliz; MARY FISHER, as next friend of her minor child, Tyrone T. Edwards; MARY JANE GARZA, as next friend of her minor children, Hilary Garza and Sarah Renea Garza; CHARLOTTE GARVIN, as next friend of her minor children Johnny Martinez, Brooklyn Garvin and BreAnna Garvin; SHANNON GARCIA, as next friend of her minor children, Andrew Garcia, Marisha Garcia, Stephen Sanchez and Allison Sanchez,

Plaintiffs-Appellees,

versus

RICHARD LADD, Etc., ET AL.,

LINDA WERTZ, Texas State Medicaid Director; BRIDGETT COOK, employee of Texas Department of Health in official capacity; SUSAN PENFIELD, M.D., employee of the Texas Department of Health in official capacity; DON GILBERT, Texas Commissioner of Health and Human Services; EDUARDO SANCHEZ, M.D., Texas Commissioner of Health,

Defendants-Appellants.

Appendix A

Appeals from the United States District Court for the Eastern District of Texas

Before REAVLEY, SMITH and DENNIS, Circuit Judges.

REAVLEY, Circuit Judge:

State officials take interlocutory appeals from orders of the district court that refused to modify a prior consent decree and required detailed state action in the administration of the Medicaid program to afford health care to the certified class of indigent children. We vacate the orders because the court has exceeded its jurisdiction.

The court expended great effort in developing a record of unmet medical needs of children in Texas that must be of concern to the people and authorities of the State, as to the district judge. The State did however have a substantial program to meet the medical needs of the class members. The number of State employees and contract workers assigned to that program has increased from about ten in 1993 to almost 500 in 2000. Participation by eligible youth has increased; the "participation ratio," a measure of the percentage of eligible persons who have received at least one screening service annually, and which must be reported to the Health Care Finance Administration, the federal agency responsible for administering the Medicaid program,[1] increased from 18 percent in 1991 to 66 percent in 1998. The utilization of dental services also increased, and the rate now is well above the national average. Texas spends more

1. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 421 (5th Cir. 1995).

that any other state on informing and outreach programs. In 1999 it made about 4.8 million outreach contacts to class members (up from about 2 million such contacts in 1995), including about 1.8 million voice-to-voice or face-to-face contacts.

The State now operates a toll-free telephone service for the benefit of class members, and the district court recognized that the State has made striking improvement in the operation of this service.[2] The State has a medical transportation program, and from 1993 to 1999 the number of rides increased from about 750,000 trips to 2.5 million trips. The State offered evidence that its Department of Health is not aware of a single eligible person who has requested services and not subsequently received them.

Nevertheless, some children are unable or, for whatever reason, fail to take full advantage of the services. The plaintiffs and district court see the answer to be oversight and enforcement by the court. Aside from the lack of judicial competence to meet this task, we hold that the court lacks jurisdiction to cure the problems or to direct the particular means and methods of this care.

BACKGROUND

This suit began in 1993 when Jeneva Frazar and Linda Frew, suing on behalf of their children, alleged that the State of Texas (the State) and the named state officials (the state defendants) were failing to provide federally mandated

2. *Frew v. Gilbert*, 109 F. Supp. 2d 579, 645 n.136 (E.D. Tex. 2000).

Medicaid benefits to the children under the Texas version of the early and periodic screening, diagnostic, and treatment services (EPSDT) program. The Medicaid program provides federal funding for medical services to the poor.[3] State participation is voluntary, but once a state joins the Medicaid program, it is charged with administering a state plan and must meet certain federal mandates.[4] A participating state must have an EPSDT program which provides services described in the Medicaid Act.[5]

3. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

4. *Id.*

5. Under 42 U.S.C. § 1396a(a)(43), a state Medicaid plan must provide for:

> (A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases,
>
> (B) providing or arranging for the provision of such screening services in all cases where they are requested,
>
> (C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and

(Cont'd)

Appendix A

Plaintiffs complained that the Texas EPSDT program, known as the Texas Health Steps program, had failed to provide federally mandated services. They claimed that the EPSDT program did not meet various requirements of 42 U.S.C. §§ 1396a(a) and 1396d(r), federal regulations, and provisions of the State Medicaid Manual. Specifically, plaintiffs claimed that the EPSDT program (1) did not have policies or procedures to assure that class members receive

(Cont'd)

> (D) reporting to the Secretary (in a uniform form and manner established by the Secretary, by age group and by basis of eligibility for medical assistance, and by not later than April 1 after the end of each fiscal year, beginning with fiscal year 1990) the following information relating to early and periodic screening, diagnostic, and treatment services provided under the plan during each fiscal year:
>
> (i) the number of children provided child health screening services,
>
> (ii) the number of children referred for corrective treatment (the need for which is disclosed by such child health screening services),
>
> (iii) the number of children receiving dental services, and
>
> (iv) the State's results in attaining the participation goals set for the State under section 1396d(r) of this title.

"Early and periodic screening, diagnostic, and treatment services" referenced in the above statutory provision is defined in 42 U.S.C. § 1396d(r) to include certain screening, vision, dental, hearing, and other services.

Appendix A

health, dental, vision, and hearing screens, (2) did not meet annual participation goals set by the Secretary of Health and Human Services, (3) did not effectively inform eligible persons of the availability of EPSDT services, (4) did not employ policies and procedures to provide or arrange for other necessary measures to correct or ameliorate physical and mental conditions discovered by the screening services, (5) did not provide case management services to all EPSDT recipients as needed, and (6) did not provide services uniformly in all political subdivisions of the State.

Plaintiffs sought injunctive relief under 42 U.S.C. § 1983 and requested class certification. In 1994 the district court certified the case as a class action. According to the district court the class consists of over 1.5 million Texas youth.[6]

The parties proceeded to conduct settlement negotiations, and agreed to a consent decree. The record indicates that this proposed consent decree was reached after the district court ordered the parties to pursue a settlement.[7] The district court conducted a fairness hearing on the proposed settlement, *see* Fed. R. Civ. P. 23(e), and in February 1996 approved and entered the consent decree.

"A consent decree is akin to a contract yet also functions as an enforceable judicial order."[8] The consent decree in the

6. *Frew*, 109 F. Supp. 2d at 587.

7. A "Joint Report Concerning the Progress of Settlement Negotiations" indicates that the district court ordered the parties to meet eight times in pursuit of a settlement.

8. *United States v. Chromalloy American Corp.*, 158 F.3d 345, 349 (5th Cir. 1998).

pending case is a lengthy document and orders the state defendants to implement many highly detailed and specific procedures relating to the EPSDT program.[9] It contemplates

9. By way of example, the decree orders the state defendants, in administering the EPSDT program, to: use certain terms, in English and Spanish, for the services it provides to Medicaid recipients (consent decree ¶ 16); mail letters to recipients, in English and Spanish, at certain designated times and containing certain information, regarding checkups, and provide brochures, fliers, and medical identification cards to recipients (¶ 17); provide certain verbal and written information to recipients through eligibility workers, and provide training to these workers (¶¶ 20-22); provide outreach units to provide specified reports and outreach services to specified groups of recipients, such as those recipients who miss checkups (¶¶ 25-64, 96, 148); employ a simplified form for medical checkups (¶ 90); maintain updated lists of health care providers (¶ 93); provide a cost of living adjustment for medical checkups (¶¶ 98-99); provide "innovative efforts to recruit all relevant professional schools to become EPSDT providers" (¶ 102); provide and facilitate training about various specified Medicaid and EPSDT subjects to professional schools and health care providers (¶¶ 104-131); adopt various procedures to promote dental care including procedures to combat baby bottle tooth decay, provide for the use of dental sealants, prepare various reports, and audit dentists (¶¶ 143-174); provide training, outreach, and other services for the benefit of special groups, including farm workers, recipients receiving care from managed care organizations, teens, and neglected and abused children (¶¶ 175-212); provide information, outreach, assessments, corrective action plans, reimbursements, and new regulations in order to alleviate transportation problems (¶¶ 213-238); provide a toll-free phone assistance system that is "more hospitable and helpful to recipients than the past system," provides specified information to recipients, and is adequately staffed by well-trained personnel (¶¶ 242-47);

(Cont'd)

continuing oversight of the agreement by the district court. It states in paragraph 6 that "the parties agree and the Court orders" the state defendants to implement the changes and procedures to the EPSDT program set out in the decree, and provides in paragraph 303 that if the state defendants fail to comply with the terms and intent of the decree, the plaintiffs "may request relief from this Court." In paragraphs 306 and 307, the state defendants are required, "[f]or the duration of this Decree," to submit "monitoring reports" four times a year to the court. The reports must include a chart which identifies "each paragraph of this Decree that obliges Defendants to act and each required action. The chart will further state the status of each activity." The decree places no limit on its duration.

A. *Appeal No. 00-41112*

On November 10, 1998, plaintiffs filed a "Motion to Enforce Consent Decree," alleging that the state defendants had not complied with numerous paragraphs of the consent

(Cont'd)

prepare and implement a case management plan for the EPSDT program (¶¶ 264-70); implement a "statewideness" plan that increases the percent of recipients receiving checkups in those counties of the State with low checkup rates (¶¶ 271-281); agree with the plaintiffs on health outcome indicators, "arrange for studies to evaluate the health of the EPSDT population," and develop corrective action plans where goals are not met (¶¶ 294-96); and revise the State's computerized management information system (¶ 298).

decree.[10] The state defendants objected to the court's jurisdiction to grant relief under 42 U.S.C. § 1983 and because of the Eleventh Amendment.

The district court conducted an evidentiary hearing, and, on August 14, 2000, entered a lengthy memorandum opinion. The court held that numerous provisions of the consent decree had been violated and that the consent decree was enforceable. By a separate order entered August 14, 2000, which the court characterized as its initial "order of enforcement," it directed defendants to mail to the court and opposing counsel, within 60 days, "proposed corrective action plans to remedy each violation of the consent decree detailed in Part One of this court's Memorandum Opinion." The plaintiffs were then given 30 days to respond to defendants' proposed corrective action plans.

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10. As detailed by the district court, the plaintiffs alleged that the defendants had violated the consent decree by failing to:

> 1) implement properly the outreach program and deliver required outreach reports; 2) assure that all class members receive medical and dental checkups; 3) develop and implement annual corrective action plans both for counties that lag behind the statewide average for checkups and for the state's medical transportation system; 4) operate the state's managed care system consistently with the mandates of the decree; 5) operate toll-free numbers so as to ensure that all calls are answered promptly by a knowledgeable and helpful staff member; 6) provide case management to all class members who need it, statewide; 7) develop methods to study each agreed health outcome measure; and 8) provide EPSDT training for health care providers.

Frew, 109 F. Supp. 2d at 588.

In appeal No. 00-41112, the state defendants appealed the August 14, 2000 order.[11] On October 18, 2000, the Fifth Circuit stayed the order during the pendency of this appeal.

B. *Appeal No. 01-40667*

After the state defendants noticed their appeal in No. 00-41112, plaintiffs filed in the district court a motion for leave to file a supplemental complaint (motion to supplement). The proposed supplemental complaint sought to add claims that dental services to the class were not available "at least to the extent that such care and services are available to the general population in the geographic area" under 42 U.S.C. § 1396a(a)(30)(A), and that dental services were not being provided "with reasonable promptness" under 42 U.S.C. § 1396a(a)(8).

The district court granted the motion to supplement. The state defendants then filed a motion to dismiss the supplemental complaint, arguing that the district court had no jurisdiction to grant the motion to supplement because of the pendency of the appeal to the Fifth Circuit. On May 17, 2001, the district court denied the motion to dismiss. In appeal No. 01-40667, the state defendants appeal the order denying the motion to dismiss.

We have consolidated appeal Nos. 00-41112 and 01-40667 for disposition herein.

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11. The parties dispute whether the notice of appeal covers only the "order of enforcement" or the memorandum opinion as well. In our view, both documents, entered simultaneously, constitute the district court's order granting the motion to enforce the consent decree and the "order" referenced in the notice of appeal.

Appendix A

DISCUSSION

A. *Appeal No. 00-41112*

In the first appeal, the state defendants essentially make three arguments. They argue that the plaintiffs did not establish violations of federal rights which entitle them to relief under § 1983. They argue second that the State is immune from suit under the Eleventh Amendment. They lastly argue that the district court misinterpreted the consent decree and expanded the scope of the decree beyond its terms and the agreement of the parties. We do not reach the last issue, and address the first two below, after first satisfying ourselves of our jurisdiction.

1. *Appellate Jurisdiction*

The district court's memorandum opinion and the accompanying "order of enforcement" are unusual documents. The district court found that certain provisions of the consent decree had been violated and that these provisions were enforceable, but did not take the next step of specifically ordering enforcement of the consent decree—an order that would amount to affirmative injunctive relief to the plaintiff class—other than directing the defendants to submit corrective action plans.

We nevertheless conclude that we have appellate jurisdiction to review the orders under 28 U.S.C. § 1292(a)(1) and the collateral order doctrine. Section 1292(a)(1) provides appellate jurisdiction over "[i]nterlocutory orders of the

Appendix A

district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

The district court held that the consent decree was enforceable under § 1983, and in so doing rejected arguments that its enforcement would violate the Eleventh Amendment. We hold that the ruling below was an order "refusing to dissolve or modify" an injunction under § 1292(a)(1). Further, insofar as the state defendants argued that enforcement of the consent decree ran afoul of the Eleventh Amendment, the collateral order doctrine allows immediate appellate review of an order denying a claim of Eleventh Amendment immunity.[12]

2. *Enforceability of Consent Decree under § 1983 and the Eleventh Amendment*

The district court, while often making reference to statutory requirements and the consistency of the consent decree with the Medicaid Act,[13] did not consider it necessary

12. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

13. For example, the court stated that the consent decree's outreach provisions "stem from" federal requirements that states inform eligible persons of the availability of EPSDT services, *Frew*, 109 F. Supp. 2d at 589, and that the decree's corrective action plan requirement "is supported" by statutory requirements, *id.* at 677. The court also considered statutory requirements in its analysis of alleged violations of consent decree provisions concerning checkups, but only because these parts of the consent decree incorporated by reference certain statutory provisions. The court believed that otherwise "the requirements of federal law would be irrelevant to this court's construal of the decree." *Id.* at 607.

to determine whether an alleged violation of the consent decree would constitute, in the absence of the decree, a statutory violation of the Medicaid Act remediable under § 1983. On the contrary, it held that "[i]n enforcing the consent decree, the court is bound solely by its language," and that "an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree."[14] This was error.

While § 1983 is usually invoked in cases where a plaintiff is claiming a constitutional violation, by its terms it extends to both constitutional and statutory violations, since it provides a remedy to those who suffer a "deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*" of the United States. Stating a claim under § 1983 requires a plaintiff to "allege a violation of rights secured by the Constitution or laws of the United States."[15] Section 1983 does not itself create any substantive rights; it only provides a remedy for the violation of a substantive federal right conferred elsewhere.[16]

Proof of a violation of a federal statute, by itself, does not entitle a plaintiff to relief under § 1983. Instead,

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14. *Frew*, 109 F. Supp. 2d at 594.

15. *Lefall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994).

16. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

in *Blessing v. Freestone*,[17] the Court explained that to obtain relief under § 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[18] Whether a statutory violation amounts to a violation of a statutory right actionable under § 1983 depends on three factors recognized in *Blessing*:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[19]

Employing this test, the Court in *Blessing* held that 42 U.S.C. § 609(a)(8), a provision of Title IV-D of the Social Security Act authorizing the Secretary of Health and Human Services to reduce payments to a state that does not "substantially comply" with Title IV-D, did not give rise to individual rights actionable under § 1983.[20]

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17. 520 U.S. 329 (1997).

18. *Id.* at 340.

19. *Id.* at 340-41 (citations, internal quotation marks omitted).

20. *Id.* at 344.

In *Wilder v. Virginia Hospital Ass'n*,[21] the Supreme Court held that the Boren Amendment to the Medicaid Act,[22] which required reimbursement according to rates that a state finds "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," was enforceable by health care providers under § 1983.[23] In making this determination the Court set out the same three factors described in *Blessing* above.[24]

In *Evergreen Presbyterian Ministries Inc. v. Hood*,[25] we applied the *Blessing* factors and held that one portion of one Medicaid provision created a federal right enforceable by Medicaid recipients, but not Medicaid providers, under § 1983. We held that the portion of 42 U.S.C. § 1396a(a)(30)(A) relating to equal access gave recipients a federal right of action,[26] but that the district court had abused

21. 496 U.S. 498 (1990).

22. 42 U.S.C. § 1396a(a)(13)(A) (1992) (repealed).

23. *Wilder*, 496 U.S. at 512.

24. *Id.* at 509.

25. 235 F.3d 908 (5th Cir. 2000).

26. *Id.* at 924. *Evergreen* held that the "equal access" portion of § 1396a(a)(30)(A)—stating that a State plan must provide "such methods and procedures . . . as may be necessary . . . to assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"—created a right of action for recipients under § 1983, but did not address the portion of subpart 30(A) relating to quality of care. *See id.* at 927 n.24.

its discretion in holding that the plaintiff recipients had shown a substantial likelihood of success in proving a violation of this provision entitling them to preliminary injunctive relief.[27]

Applying the *Blessing* factors to the pending case, there is no doubt that under the first factor the Medicaid program generally is intended to benefit qualifying recipients such as members of the plaintiff class. The Medicaid Act is, however, a large and complex statute, and whether plaintiffs seeking to enforce a federal right under the Medicaid Act can meet this requirement depends on which statutory provision or provisions they rely. In *Evergreen*, we further explained that receipt of an indirect benefit under the statutory provision in issue "is not sufficient to support a claim that [plaintiffs] are its intended beneficiaries."[28]

Similarly, moving to the second prong of the *Blessing* test, while some of the provisions of the Medicaid Act are not so vague and amorphous that enforcement would strain judicial competence, plaintiffs' claims can succeed only if predicated on those provisions.

Under the third *Blessing* factor, the Medicaid statute does impose some binding obligations on the states. With respect to the EPSDT program at issue in the pending case, 42 U.S.C. § 1396a(a) provides that state Medicaid plans "must" meet the federal mandates set out in that statute, including the requirements for EPSDT programs set out in § 1396a(a)(43). We have explained that once states choose to participate in

27. *Id.* at 934.

28. *Id.* at 929.

Medicaid, they "are required to provide certain minimum mandatory services," including EPSDT services.[29] Again, however, we are not prepared to hold that every provision of the Medicaid Act which might be relevant to plaintiffs' claims imposes a binding obligation on the states.

In addition to the three factors described above, *Blessing* goes on to state:

> Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress specifically foreclosed a remedy under § 1983. Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.[30]

Under this last part of the *Blessing* analysis, Congress did not expressly foreclose resort to § 1983, or establish a comprehensive remedial scheme intended to supplant § 1983. While the Secretary of Health and Human Services is authorized to cut off federal funding to a State that fails to

29. *Mitchell v. Johnston*, 701 F.2d 337, 340 (5th Cir. 1983).

30. *Blessing*, 520 U.S. at 341 (citation, internal quotation marks omitted).

comply with the Medicaid statute,[31] there is no comprehensive enforcement scheme that would foreclose § 1983 relief under *Blessing*.[32]

It is clear that a violation of every provision of the Medicaid Act does not become actionable under § 1983 simply because some aspects of the Act meet the requirements of *Blessing* and related authority. *Blessing* itself cautioned against such a holding, since it found that the Social Security legislation at issue was a "multifaceted statutory scheme" containing many provisions which "do not fit our traditional three criteria for identifying statutory rights."[33] While the courts in *Wilder* and *Evergreen* held that violations of particular provisions of the Medicaid Act were actionable by certain plaintiffs under § 1983, it does not follow that every section of the Medicaid Act that might be relevant to plaintiffs' claims will support a § 1983 claim. In *Blessing*, the Court reasoned that a remand was warranted to allow the district court to construe the claims "in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting. Only by manageably breaking down the complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right."[34]

31. 42 U.S.C. § 1396c.

32. *See Wilder*, 496 U.S. at 522 (holding that Medicaid Act's "administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983").

33. *Blessing*, 520 U.S. at 344.

34. *Id.* at 346.

The district court's authority to enforce the consent decree is further limited by the Eleventh Amendment. This suit was brought against state officials in their official capacities, seeking injunctive relief under § 1983 and the authority of *Ex Parte Young*[35] and related authority.

A fundamental rule of federal jurisdiction, of which the Eleventh Amendment is an exemplification, is that the judicial power of the federal courts granted by the Constitution does not extend to suits by private parties against the states.[36] In order to accommodate both the supremacy of federal law and the Eleventh Amendment, *Ex Parte Young* allows a private suit against state officials to enjoin state conduct that violates federal law.[37] "[T]he *Young* doctrine rests on the need to promote the vindication of federal rights."[38] It "has not been provided an expansive interpretation."[39]

We addressed the enforceability of a consent decree in the face of Eleventh Amendment immunity in *Lelsz v. Kavanagh*.[40] In that case the state defendants appealed a

35. 209 U.S. 123 (1908).

36. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 (1984).

37. *See id.* at 102-03; *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

38. *Pennhurst*, 465 U.S. at 105.

39. *Id.* at 102.

40. 807 F.2d 1243 (5th Cir. 1987).

district court order purporting to enforce a consent decree by ordering the State to furlough a certain number of mentally ill patients in the State's care.[41] We stated that the relief ordered, "in effect, requires state officials to comply with state law."[42] We held that the district court was without jurisdiction to enforce the consent decree.[43]

The plaintiffs in *Lelsz* argued that the consent decree was enforceable under *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*,[44] where the Supreme Court held that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."[45] We rejected this argument, reasoning that if the court had no jurisdiction, *Firefighters* did not apply.[46] We further explained that *Firefighters*

> addressed the *entry* of a consent decree and held that the parties' agreement could result in a decree whose terms would exceed the court's remedial authority under a governing statute. It does not

41. *Id.* at 1245.

42. *Id.* at 1247.

43. *Id.* at 1255.

44. 478 U.S. 501 (1986) ("*Firefighters*").

45. *Id.* at 525.

46. *Lelsz*, 807 F.2d at 1252.

enlarge the court's latitude to issue its own, different order enforcing or modifying the decree, for in that case we presume the court must fall back on its inherent jurisdiction. . . .

. . . .

> [T]he right/remedy distinction urged by appellees inevitably collides with the principles of federalism and comity which animate the Eleventh Amendment. . . . Therefore, the only legitimate basis for federal court intervention, consistent with the Eleventh Amendment is the vindication of federal rights. If a federal court remedy unfounded in federal law intrudes into the governance of matters otherwise presided over by the states, no federal right has been vindicated.[47]

In *Saahir v. Estelle*,[48] we also addressed the enforceability of a consent decree. In that case, the district court had entered a consent decree approving a settlement between the plaintiff inmate and the state defendants which allowed the plaintiff to order tapes.[49] The plaintiff filed a motion for contempt when some of his tapes were confiscated.[50] We recognized that in *Lelsz* we had held "that the district court lacked

47. *Id.*

48. 47 F.3d 758 (5th Cir. 1995).

49. *Id.* at 760.

50. *Id.*

jurisdiction to enforce a consent decree against the State to the extent that the relief ordered in the decree was based on state law . . . because the only legitimate basis for federal court intervention consistent with the Eleventh Amendment was the vindication of federal rights."[51] We held that enforcing the consent decree to allow the plaintiff to keep non-religious tapes was not required under state law, and further held that

> enforcing the provision would not be required by any federal or constitutional law, as we fail to discern any First Amendment protections except as to the religious tapes. Because "the only legitimate basis for federal court intervention, consistent with the Eleventh Amendment is the vindication of federal rights," *Lelsz*, 807 F.2d at 1252, the federal courts have no jurisdiction to enforce the provision as it relates to the non-religious tapes.[52]

Underlying our reasoning in *Lelsz* and *Saahir* is the jurisdictional nature of the Eleventh Amendment. Eleventh Amendment immunity is in "the nature of a jurisdictional bar."[53] Regardless of what the parties agreed to in the consent decree, "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial

51. *Id.* at 761.

52. *Id.*

53. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

power."[54] The Eleventh Amendment "is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts."[55]

We recognized in *Lelsz*[56] and *Saahir*[57] that a federal court "must fall back on its inherent jurisdiction" when it issues an order enforcing a consent decree. For our purposes, the essential holding of *Lelsz* and *Saahir* is that a consent decree like the one entered by the district court is not enforceable against the State or its officials except to vindicate a federal right granted in the federal Constitution or a federal statute, since "the consent decree does not enlarge the courts' jurisdiction."[58] *Blessing* sets out the factors used in deciding whether a statutory violation amounts to a violation of a "federal right" actionable under § 1983.

The district court held that "the *Firefighters* test will be applied to the decree provisions sought to be enforced by plaintiffs."[59] In *Firefighters* the Supreme Court upheld a consent decree that, according to the petitioner, granted relief

54. *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998).

55. *Pennhurst*, 465 U.S. at 120.

56. *Lelsz*, 807 F.2d at 1252.

57. *Saahir*, 47 F.3d at 761.

58. *Id.* at 762.

59. *Frew*, 109 F. Supp. 2d at 671.

that was unavailable under the statute in issue. The Court, without reaching the issue of statutory construction, concluded that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."[60] In the pending case, the district court, under its interpretation of the "*Firefighters* test," erroneously held that

> to sustain federal court jurisdiction to approve a consent decree against state officials, the remedies in the decree must only serve to: 1) resolve a dispute within the court's subject matter jurisdiction, 2) come within the general scope of the case made by the pleadings, and 3) further the objectives of the law upon which the complaint was based.[61]

Although the district court engaged at some length in a generalized discussion of the *Blessing* factors,[62] it is clear to us that the district court did not conduct a particularized *Blessing* analysis as to each alleged violation of the consent decree. For example, rather than deciding whether a statutory violation took place and applying the *Blessing* factors, the court, in concluding that the training provisions of the consent decree were enforceable, agreed with the state defendants that training "is not a requirement of federal

60. *Firefighters*, 478 U.S. at 525.

61. *Frew*, 109 F. Supp. 2d at 666.

62. *Id.* at 661-665, 672 n.202.

law."[63] It nevertheless found under the "*Firefighters* test" that the training provisions "served to resolve this dispute, and they come within the general scope of the case made by the pleadings," and that training "clearly furthers the objectives of the EPSDT statute."[64] The court made the same findings in concluding that the toll-free line provisions of the decree were enforceable, although agreeing with the state defendants that "no such lines are required by federal law or regulation."[65] Instead of determining whether each alleged violation of the consent decree was a statutory violation actionable under *Blessing*, the court held that "an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree."[66]

Firefighters is a consent decree case but is not an Eleventh Amendment case,[67] and does not therefore address the deference federal courts must show for the Eleventh Amendment when called upon to enjoin state officials under *Ex Parte Young*. "Eleventh Amendment immunity represents a real limitation on a federal court's federal-question

63. *Id.* at 677.

64. *Id.*

65. *Id.*

66. *Id.* at 594.

67. *Firefighters* involved a suit against the City of Cleveland. Cities do not enjoy Eleventh Amendment immunity. *Evans v. City of Bishop*, 238 F.3d 586, 589 (5th Cir. 2000).

jurisdiction."[68] Moreover, we expressly distinguished *Firefighters* in both *Lelsz* and *Saahir*, reasoning that (1) *Firefighters* does not help the plaintiff if the district court lacks jurisdiction as a result of the Eleventh Amendment, and (2) even if a federal court is not necessarily barred from *entering* a consent decree providing broader relief than it could have awarded at trial, it must fall back on its own jurisdiction when it issues an order *enforcing* the decree.[69] The Eleventh Amendment limits that jurisdiction to the enforcement of federal rights.

Plaintiffs argue that *Lelsz* should be limited to a consent decree based only on state law. The district court, likewise, would limit *Lelsz* to suits to enforce only state law claims, and "declined" to apply it.[70] We do not read *Lelsz* so narrowly, and in any event *Saahir* cannot be read as limited to state-law-based consent decrees. Insofar as the district court noted authority that found the distinction we drew in *Lelsz* and *Saahir* between jurisdiction to enter and jurisdiction to enforce a consent decree "utterly indefensible" or "untenable,"[71] the district court, and we, are bound by the law of our circuit.

Before the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate

68. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

69. *Lelsz*, 807 F.2d at 1252; *Saahir*, 47 F.3d at 761.

70. *Frew*, 109 F. Supp. 2d at 671.

71. *Id.* at 670.

that any such consent decree violation is also a violation of a federal right, by showing (1) a statutory violation of a specific provision of the Medicaid Act, (2) which was intended to benefit plaintiffs, (3) which is not so vague and amorphous that its enforcement would strain judicial competence, and (4) which imposes a binding obligation on the states. Lest the court run afoul of *Blessing*, it must not paint "with too broad a brush"[72] by failing to "separate out the particular rights it believe[s] arise from the statutory scheme."[73] The *Blessing* criteria can only be properly applied when the claims are "broken down into manageable analytic bites."[74]

3. *Relief Available to Plaintiffs*

a. *Whether a Federal Court Can Set EPSDT Performance and Participation Standards*

As discussed above, plaintiffs are only entitled to injunctive relief if they can show a violation of specific statutory provision that is actionable under § 1983 because it satisfies the *Blessing* test. Although relief under § 1983 for a violation of EPSDT provisions may be available, perfect state compliance with these provisions is not required. While a district court should have some discretion to craft an injunction to remedy violation of the Medicaid Act, there are limits on the relief available from a federal court.

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72. *Blessing*, 520 U.S. at 342.

73. *Id.* at 345.

74. *Id.* at 342.

We reach this conclusion based on our understanding of congressional intent. Our goal, of course, in construing a statute is to give effect to congressional intent, and we begin this task by looking to the language of the statute itself.[75]

In the pending case, the district court did not direct that particular individuals receive EPSDT services to which they were entitled under federal law. It has instead taken upon itself the task of reworking the procedures and mechanisms whereby EPSDT services are provided to the totality of eligible participants. The court has become overseer of the State's Medicaid plan. As such, the court assumes the role of assuring that the State's *plan* meets federal mandates, which in turn raises the issue of whether the plan must always, unfailingly, provide the EPSDT services described in the Medicaid Act. We think that is not required.

Congress did not intend that a court can require that a state participating in the Medicaid program must always provide every EPSDT service to every eligible person at all times. Perfect compliance with such a complex set of requirements is practically impossible, and we will not infer congressional intent that a state achieve the impossible. Furthermore, looking to § 1396a(a)(43), even though it refers in subpart (A) to providing notice to "all persons," and refers in subpart (B) to the provision of EPSDT screening services in "all cases" where such services are requested, the opening text of § 1396a(a) and § 1396a(a)(43) modify all of this language by only requiring that a state "*plan*" must "*provide for*" meeting these requirements. In § 1396a(b), Congress

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75. *Ruiz v. Estelle*, 161 F.3d 814, 819 (5th Cir. 1998).

vested in the Secretary of Health and Human Services (Secretary) the initial responsibility for approving state plans. Section 1396a(a)(43)(D) requires that the state plan provide for reporting certain data including "the State's results in attaining the participation goals set for the State under section 1396d(r) of this title." Section 1396d(r) provides:

> The Secretary shall, not later than July 1, 1990, and every 12 months thereafter, develop and set annual participation goals for each State for participation of individuals who are covered under the State plan under this subchapter in early and periodic screening, diagnostic, and treatment services.

In § 1396c, the Secretary is authorized to reduce or eliminate in its discretion, federal funding for state plans which are not in compliance with § 1396a.

In our view, Congress has therefore spoken to the success expected of a state plan: it should meet EPSDT participation goals set by the Secretary. Under the third prong of *Blessing*, these are the only participation goals which are unambiguously imposed on the states. We do not read the statute as allowing a federal district court to require a higher standard of success. Congress did not in our view create such a federal right. Furthermore, under the second prong of *Blessing*, allowing federal courts, which are hardly expert at the intricacies of providing volume health care services to the poor, to choose their own performance goals would in our view render the EPSDT provisions so vague and amorphous as to strain judicial competence.

Moreover, we believe that plaintiffs cannot sue under § 1983 to require a plan to meet statewide or systemwide participation or performance measures, because, under *Blessing*, state compliance with such standards is not an individualized right actionable under § 1983. In *Blessing*, the court explained:

> [T]he requirement that a State operate its child support program in "substantial compliance" with Title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied. A State substantially complies with Title IV-D when it provides most mandated services (such as enforcement of support obligations) in only 75 percent of the cases reviewed during the federal audit period. 45 C.F.R. § 305.20(a)(3)(iii) (1995). States must aim to establish paternity in 90 percent of all eligible cases, but may satisfy considerably lower targets so long as their efforts are steadily improving. 42 U.S.C. § 652(g). It is clear, then, that even when a State is in "substantial compliance" with Title IV-D, any individual plaintiff might still be among the 10 or 25 percent of persons whose needs ultimately go unmet.

> Moreover, even upon a finding of substantial noncompliance, the Secretary can merely reduce the State's AFDC grant by up to five percent; she cannot, by force of her own authority, command the State to take any particular action or to provide any services to certain individuals. In short, the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights.[76]

An analogous situation is presented here. The statute authorizes the Secretary to set certain participation goals, and to cut federal funding if "there is a failure to substantially comply" with statutory provisions.[77] Under *Blessing*, a state's failure to meet such a participation goal or other systemwide performance standard does not give rise to individual rights actionable under § 1983. The fact that plaintiffs have pursued their suit as a class action is of no consequence. A class action is merely a procedural device; it does not create new substantive rights and cannot extend the subject matter jurisdiction of the district court.[78]

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76. *Blessing*, 520 U.S. at 343-44.

77. 42 U.S.C. § 1396c.

78. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

b. *Whether the Plaintiffs Have Shown a Statutory Violation*

We now proceed to decide whether consent decree violations found by the district court amount to a statutory violation of the EPSDT provisions actionable under § 1983.

Rather than focusing on the statutory requirements, the court focused on the consent decree requirements and proceeded to find numerous consent decree violations. These consent decree provisions impose standards and requirements on the State which are not required by the Medicaid statute.

Looking to statutory EPSDT provisions, the requirement of subpart 43(B) that a state plan provide screening services is limited to the provision of services "*where they are requested.*" We agree with the state defendants that a statutory violation of this requirement cannot occur except in cases where eligible persons request screening services. The district court recognized that the evidence did not support a finding that screening services were ever denied after they were so requested, noting that "[s]everal witnesses testified that defendants are not aware of a single class member who has requested services and not subsequently received those services."[79]

Whether the state plan has met performance goals set by the Secretary is unclear from the record. Regardless of the terms of the consent decree, the district court cannot impose

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79. *Frew*, 109 F. Supp. 2d at 607 n.51.

higher performance standards than those set by the Secretary, and cannot under § 1983 impose systemwide performance or participation standards. The court did not find specific EPSDT statutory violations which might be actionable under § 1983, nor does any amount of sifting through the evidence allow us to make such findings. Instead the court found violations of provisions of the consent decree which are not required by the Medicaid Act.

The district court first found violations of consent decree provisions relating to outreach, including provisions that the State "effectively" inform the class about EPSDT services and conduct outreach efforts to encourage use of these services.[80] The Medicaid Act EPSDT provisions, at subpart 43(A), only require a state plan providing for "informing all [eligible persons] of the availability of [EPSDT] services." It does not expressly require "effective" conveyance of information, and does not require outreach programs that extend beyond an effort at informing eligible persons of available EPSDT services. As explained above, we read the Act to limit the success required from such efforts to meeting performance standards set by the Secretary. The district court did not find that any such standards were violated, and in any event lacks the power to impose systemwide standards under § 1983, since such standards do not give rise to individual rights. Instead, employing its understanding of the consent decree, and finding itself "bound solely by its language,"[81] the district court concluded that the State's outreach efforts fell short of its understanding of the dictates of the consent decree.

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80. *Id.* at 589-600.

81. *Id.* at 594.

The court next considered whether the State had violated consent decree provisions concerning medical and dental checkups.[82] Insofar as the court concluded that insufficient numbers of Medicaid recipients were receiving medical and dental checkups, the court again failed to recognize that the only participation goals mandated under the statute are those set by the Secretary, and that, under *Blessing*, such performance goals do not give rise to individual rights actionable under § 1983. The court was not authorized or competent to impose its own participation goals.

The district court also held that, with respect to checkups, the State had failed to report certain data as required by ¶¶ 212 and 284 of the consent decree, which require the state defendants to report the number and percent of recipients who receive all their scheduled medical and dental checkups. The Medicaid Act's EPSDT provision does not require states to provide this data. Certain other data must be reported under 42 U.S.C. § 1396a(a)(43)(D), but even as to this requirement we do not believe that it creates a federal right actionable under § 1983. *Blessing* held that requirements which benefit eligible individuals "only indirectly," such as requirements for a state's data processing system which "maintain the data necessary to meet federal reporting requirements," do not give rise to "individualized rights" actionable under § 1983.[83] Reporting requirements, likewise, do not give rise to individualized rights.

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82. *Id.* at 600-613.

83. *Blessing*, 520 U.S. at 344-45.

The district court also discussed, with respect to dental checkups, evidence of a shortage of dentists. However, *Blessing* makes clear that staffing mandates, even where such mandates have a statutory basis, are not enforceable under § 1983, since they do not give rise to individual rights, and because enforcing an undefined standard of "sufficient" staffing would strain judicial competence.[84]

The district court next found that the State had violated provisions of the consent decree concerning corrective action plans.[85] The consent decree has provisions requiring the State to report participation by class members in medical and dental checkups by county or cluster of counties, and to develop corrective action plans for "lagging" counties with relatively low participation rates. The Medicaid Act does not impose such reporting requirements and corrective action plans, and for the reasons discussed above, such reporting and systemwide corrective action mandates, even if found in the statute, would not give rise to individuals rights enforceable under § 1983. And again, the district court has no power to create its own performance or participation standards for "lagging" counties.

The court next turned to alleged violations of consent decree provisions concerning the receipt of EPSDT services through managed care providers.[86] Without belaboring the

84. *Id.* at 345.

85. *Frew*, 109 F. Supp. 2d at 613-18.

86. *Id.* at 618-37.

complex facts presented concerning these provisions, the court discussed evidence that the State's data was flawed, that participation rates for class members in managed care was lower than the rates for other class members, and that the level of care for managed care class members was inadequate. The court did not find a specific violation of a statutory managed care requirement, assuming that one exists. We agree with the state defendants that there is no basis in federal law for heightened or additional benefits to class members receiving care through managed care providers. As discussed above, the State's failure if any to provide reports or data under the consent decree cannot amount to a violation of individual rights actionable under § 1983. Insofar as the court found that participation rates were lower in managed care, the court cannot impose its own participation rates for managed care patients.

The court separately found violations of a consent decree provision concerning accelerated managed care services to migrant farm workers. Again, the court did not rely on a statutory provision of the Medicaid Act requiring such special services. The court also found a violation of ¶ 194 of the consent decree, requiring "appropriate training" of health care providers in the managed care system. Such training is not mandated by statute, as the district court noted,[87] and is no more actionable under § 1983 than the "sufficient staff" mandate whose enforcement via a § 1983 action was foreclosed in *Blessing*, as discussed above.

87. *Id.* at 677 ("Training, defendants correctly argue, is not a requirement of federal law.").

The district court next considered toll-free line requirements set out in ¶ 247 of the consent decree,[88] and found that the State had violated requirements that recipients receive "prompt service" from an operator who is "knowledgeable, helpful, and polite." As the district court acknowledged, "no such lines are required by federal law or regulation."[89] Even if there were such statutory requirements, a toll-free line system would be akin to the data processing system which the Court in *Blessing* held did not give rise to individualized rights actionable under § 1983.

The district court next turned to consent decree provisions relating to case workers who assist class members in arranging for the treatment they need.[90] The court did not find a statutory violation actionable under § 1983, but instead focused on its interpretation of the consent decree. To the extent that the district court found that participation levels by EPSDT recipients or requirements for adequate staffing and training of case managers had not been met, we again do not believe that such failures can support a § 1983 violation. The same can be said for the last alleged violations of the consent decree considered by the district court, namely the alleged failure to report certain data relating to outcome measures,[91] and the alleged failure to provide training for health care providers.[92]

88. *Id.* at 637-646.

89. *Id.* at 677.

90. *Id.* at 646-654.

91. *Id.* at 654-658.

92. *Id.* at 658-660.

In short, so far as we can tell from this record, plaintiffs have not established any violations of the EPSDT provisions of the Medicaid statute which are actionable under § 1983 and the *Ex Parte Young* exception to the Eleventh Amendment.

4. *Other Issues*

a. *Waiver of Sovereign Immunity*

After they filed their appellees' brief, plaintiffs filed two FED. R. APP. P. 28(j) letters, referring the court to our decision in *Watson v. Texas*[93] and the Supreme Court's decision in *Lapides v. Board of Regents of the University System of Georgia*.[94] For the first time,[95] plaintiffs argued in these letters

93. 261 F.3d 436 (5th Cir. 2001).

94. 122 S.Ct. 1640 (2002).

95. Although *Watson* and *Lapides* were decided after plaintiffs submitted their brief and were the proper subject of Rule 28(j) letters, we question whether plaintiffs should have raised the issue of waiver of Eleventh Amendment immunity at an earlier stage in this litigation. Waiver of Eleventh Amendment immunity is certainly not a new concept. Generally, we do not review issues raised for the first time on appeal unless they involve purely legal questions and failure to consider them would result in manifest injustice. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Further, "[i]n the absence of manifest injustice, this court will not consider arguments belatedly raised after appellees have filed their brief." *Najarro v. First Fed. Sav. & Loan Ass'n of Nacogdoches*, 918 F.2d 513, 516 (5th Cir. 1990). In these circumstances, however, we consider this waiver issue.

(Cont'd)

that the State waived its Eleventh Amendment immunity by voluntarily entering into the consent decree. The state defendants argue that there was no waiver because the consent decree was negotiated by the office of the Attorney General, and only the Texas Legislature can waive the State's sovereign immunity. We need not decide this thorny question.[96]

(Cont'd)
There are no disputed facts relevant to this issue and it presents a question of law. Further, as discussed above, Eleventh Amendment immunity is jurisdictional in nature, and the court of appeals has a continuing duty to consider, *sua sponte* if necessary, the basis of the district court's jurisdiction. *Solsona v. Warden, F.C.I.*, 821 F.2d 1129, 1132 n.2 (5th Cir. 1987).

96. In *Watson*, in which we held that a dispute fell within the State's waiver of sovereign immunity contained in a settlement agreement, we stated: "We presume that the attorney general for the State of Texas had the power to sign the Agreement on behalf of Texas and had the power to waive the state's sovereign immunity." *Watson*, 261 F.3d at 441 n.11. However, the Texas Supreme Court has recently stated that it "has long recognized that it is the Legislature's sole province to waive or abrogate sovereign immunity." *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) (internal quotation marks omitted). *See also Dep't of Pub. Safety v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 495 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) ("[T]he Attorney General was without legal power or authority to waive the right of the State to immunity from the suit. . . . "). While we have stated that a waiver of Eleventh Amendment immunity is decided under federal standards, *see In re Allied-Signal, Inc.*, 919 F.2d 277, 281 n.4 (5th Cir. 1990), we have also recognized that, in determining whether a state official or entity has authority to waive Eleventh Amendment immunity, we look to state law, *see Magnolia Venture*
(Cont'd)

Instead, we hold that under well-established law for determining a waiver of Eleventh Amendment immunity, the State did not do so in this case. "The Supreme Court has made it clear that we may find a waiver of a state's Eleventh Amendment immunity in only the most exacting circumstances."[97] The states's consent to suit must be "unequivocally expressed."[98]

The State has not unequivocally waived its Eleventh Amendment immunity. The consent decree expressly states in paragraph 301 that "Defendants do not concede liability." The state defendants repeatedly raised in the district court an Eleventh Amendment defense to the enforcement of the decree, contending that the entry of the consent decree did not expand the district court's jurisdiction, and that a violation of the consent decree, by itself, was "of no consequence." It made numerous other statements to the district court in pleadings and in open court indicating that it did not intend to waive its Eleventh Amendment immunity, arguing for example that "[i]f the court determines that no federal right has been violated it lacks jurisdiction to impose a remedy

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(Cont'd)
Capital Corp. v. Prudential Sec., Inc., 151 F.3d 439, 444 (5th Cir. 1998). To further complicate matters, we have recognized that "a state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity under federal law." *Allied Signal*, 919 F.2d at 281 n.4.

97. *Magnolia Venture Capital Corp.*, 151 F.3d at 443.

98. *Id.* at 443 (quoting *Pennhurst*, 465 U.S. at 99).

even if it determines that Defendants have violated a term of the decree." The district court rejected these arguments.[99]

A critical distinction between the pending case and the cases cited in the Rule 28(j) letters—*Watson* and *Lapides*—is that in those cases the state voluntarily chose to submit itself to the jurisdiction of the federal court. In *Watson*, the State of Texas elected to bring its tobacco action in federal court. In *Lapides*, the state defendants removed the case to federal court.[100] These cases and others establish that a state can waive its Eleventh Amendment immunity by voluntarily invoking the federal court's jurisdiction,[101] but in the pending case the State did not do so; the state officials were sued as defendants. The State has not waived its Eleventh Amendment immunity.

b. *Westside Mothers*

The state defendants argue in their reply brief that we should accept arguments embraced by a district court in

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99. *Frew*, 109 F. Supp. 2d at 665-671.

100. *Lapides*, 122 S. Ct. at 1642.

101. *See id.* at 1644 (recognizing "general legal principle" that a state waives its Eleventh Amendment immunity when it voluntarily invokes the federal court's jurisdiction); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) ("Generally, we will find a waiver . . . if the State voluntarily invokes our jurisdiction. . . .").

Westside Mothers v. Haveman.[102] That case concerned a challenge to Michigan's EPSDT program. The district court held that the Medicaid statute, as legislation enacted pursuant to the Spending Clause,[103] was not the supreme law of the land under the Supremacy Clause[104] and therefore the *Ex Parte Young* exception to Eleventh Amendment state immunity was inapplicable.[105]

Suffice it to say that we decline to follow this ruling. We have not recognized a "Spending Clause exception to the *Ex Parte Young* exception" to the Eleventh Amendment. The district court's decision in *Westside Mothers* on this issue has now been reversed by the Sixth Circuit,[106] which noted that the Spending Clause analysis of the district court was

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102. 133 F.Supp.2d 549 (E.D. Mich. 2001), *aff'd in part, rev'd in part*, 289 F.3d 852 (6th Cir. 2002). *Westside Mothers* was decided after the state defendants had filed its initial brief in the pending appeal. We granted leave to the state defendants to file an additional brief on the issues raised in *Westside Mothers*, and also granted leave the United States to file an amicus curiae brief out of time on the *Westside Mothers* issues. In addition, much of the state defendants' briefing in appeal No. 01-40667, addressed below, is inspired by the district court's novel analysis in *Westside Mothers*.

103. U.S. CONST. art. I, § 8, cl. 1.

104. U.S. CONST. art. VI, cl. 2.

105. *Westside Mothers*, 133 F. Supp. 2d at 561-62.

106. *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002).

inconsistent with a number of Supreme Court cases.[107] We agree with the Sixth Circuit that "laws validly passed by Congress under its spending powers are supreme law of the land."[108] For purposes of the Supremacy Clause and *Ex Parte Young*, the mandates set out in Medicaid statute are more than contractual; they are federal law.

The district court in *Westside Mothers* concluded that the *Ex Parte Young* exception to Eleventh Amendment immunity was unavailable for several reasons besides the Spending Clause rationale. These reasons were also rejected on appeal, and we likewise find none of them persuasive.[109]

107. *Id.* at 859-60 (citing *Townsend v. Swank*, 404 U.S. 282 (1971), and other cases).

108. *Id.* at 860.

109. Briefly, the district court in *Westside Mothers* held that *Ex Parte Young* was inapplicable to enforce Medicaid legislation for the additional reasons that (1) the state is the real party in interest, (2) the court lacks authority to enjoin state officers performing discretionary, as opposed to ministerial, functions, and (3) where the statutory scheme provides a remedy, the court may not substitute an alternative form of relief under § 1983. *Westside Mothers*, 133 F. Supp. 2d at 562-75.

As to the first reason, *Ex Parte Young* cannot be swept aside because the state is the real party in interest. The raison d'etre for *Ex Parte Young* and its continuing significance in our constitutional scheme is that it provides an exception to the Eleventh Amendment allowing injunctive relief against state officials where the state itself is for all practical purposes the real party in interest, in order to accommodate the Supremacy Clause. In all such suits state officials are sued in their official capacities, although the state is the real party in interest. The Supreme Court has observed that "a suit against

(Cont'd)

B. *Appeal No. 01-40667*

While we have jurisdiction over the appeal because of the Eleventh Amendment issue, which is an issue that can be

(Cont'd)
a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted). Hence, *Ex Parte Young* is often described as employing a legal "fiction." *E.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc); *Brennan v. Stewart*, 834 F.2d 1248, 1252 (5th Cir. 1988).

As to the second reason—that the court cannot compel state officials to perform discretionary functions—we again note that states participating in the Medicaid program must meet federal statutory mandates. For purposes of *Ex Parte Young* injunctive relief, states and their agents have no "discretion" to violate federal law. Hence, *Young* itself recognized that "[a]n injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex Parte Young*, 209 U.S. at 159.

The third reason—that the statutory scheme provides a remedy—is based on the district court's interpretation of *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). In that case the Court found that, in light of "the carefully crafted and intricate remedial scheme," *id.* at 73-74, set forth in the statute in question, Congress did not intend to create an *Ex Parte Young* remedy for violation of the statute. In contrast to the statutory scheme at issue in *Seminole Tribe*, *see id.* at 49-50, the Medicaid Act does not have an intricate remedial scheme regulating noncompliance by a state. The only statutory remedial sanction available under the Medicaid statute is that the Secretary of Health of Human Services can cut funding to the state. 42 U.S.C. § 1396c.

raised at any point because it is jurisdictional, there is no need to say more about the limits of the district court's jurisdiction. Plaintiffs are objecting to the shortage of transportation for class members to obtain dental services and to the rates of payment set by the Texas Legislature. Unless plaintiffs can prove that the right to dental services is being denied by the defendants, the court cannot act. We therefore vacate the order addressing the motion to dismiss.

CONCLUSION

The orders of the district court in both appeals are VACATED and the case is REMANDED for whatever proceedings that may be consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, PARIS DIVISION DATED MAY 15, 2001 AND FILED MAY 17, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

CIVIL ACTION NO. 3:93CV65

LINDA FREW, et al.,

Plaintiffs,

v.

DON GILBERT, et al.,

Defendants.

ORDER

The Court now considers Defendants' Motion to Dismiss [Document No. 358], pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants in the above-entitled and numbered civil action seek to dismiss under the plaintiffs' supplemental complaint allowed and accepted by this Court on March 12, 2001. As grounds for their request, the defendants reiterate the argument put forth to oppose the plaintiffs' initial submission of the supplemental complaint. As this Court has already considered and rejected the

defendants' argument, its repetition alone will not succeed. For the reasons set forth in the March 12, 2001, Order [Document No. 354], Defendants' Motion to Dismiss shall be and is hereby

DENIED

It is so **ORDERED.**

SIGNED this 15th day of May 2001.

s/ William Wayne Justice
William Wayne Justice
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, PARIS DIVISION DATED MARCH 9, 2001 AND FILED MARCH 12, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

CIVIL ACTION NO. 3:93CV65

LINDA FREW, et al.,

Plaintiffs,

v.

DON GILBERT, et al.,

Defendants.

ORDER

Plaintiffs' Motion for Permission to File Their First Supplemental Complaint [Document No. 34] is now before the court for consideration. By way of their motion, plaintiffs seek to supplement their Third Amended Complaint, which dates from October 14, 1994. Defendants oppose the motion. For the reasons discussed below, plaintiffs' motion will be granted.

Before reaching the merits of the application, the court must establish its jurisdiction to hear the motion. On August 14, 2000, the Court entered its Memorandum Opinion and Order concerning plaintiffs' motion to enforce the consent decree. The opinion and order are currently on appeal and under review by the United States Court of Appeals for the Fifth Circuit.

A notice of appeal divests the district court of jurisdiction over the judgment or order that is subject to the appeal and the specific issues contained therein. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402 (1982); *Henry v. Independent Am. Sav. Ass'n*, 857 F.2d 995, 997 (5th Cir. 1988). Accordingly, the lower court's authority to act is constrained as to the subject matter and issue on appeal, and the court may freely proceed with issues outside the scope of review. *See Taylor v. Sterrett*, 640 F.2d 663, 667-68 (5th Cir. 1981); *see also Perez v. Dupuch*, 1998 WL 760282 *2 n.4 (N.D. Tex.) (announcing that pendency of appeal does not deprive court jurisdiction to rule on unrelated motion).

Plaintiffs seek to supplement their complaint with new grounds and new party representatives. The claims allege violations of sections of the Medicaid Act (42 U.S.C. § 1396 *et seq.*) separate and distinct from those already asserted in the case, and as such, they fall outside the scope of the court's order currently under appellate review.[1] Consequently, the

1. While defendants may be correct in observing the inclusion of the court's findings of fact regarding dental reimbursement rates and the accessibility of dental services to class members, those findings supported claims made under separate provisions of the Act identified in the Consent Decree and the Plaintiffs' Third Amended Complaint.

court is not divested of its competence to hear and determine plaintiffs' motion.

Rule 15(d) of the Federal Rules of Civil Procedure provides that a party, with leave of court, may supplement its complaint to incorporate transactions, occurrences or events which have happened since the date of the pleading. Fed. R. Civ. P. 15(d). An application for leave to file a supplemental pleading is addressed to the sound discretion of the court. 6A Wright, Miller & Kane, *Federal Practice and Procedure* § 1504, pp. 186-87 (1990). Such motion should be granted when doing so will further the interests of judicial economy, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any party to the action. *Id.* In making is determination, the court will consider the particular relationship of the new claims to the issues already contained in the complaint, the effect of supplementation in settling the entire controversy before the parties, any possible prejudice to the opposing party, and the general concerns for judicial economy. *See id.* § 1510, pp. 210-11. As appropriate given the particularities of this class action, the court remains mindful of the rule's underlying purpose: to promote as complete an adjudication as possible. *See id.* § 1504, p. 177.

Supplementation of plaintiffs' complaint appears proper under the circumstances. In essence, plaintiffs seek to broaden their available remedies to achieve prompt, quality medical and dental care for class members. According to their submission, the provision of dental services to class members has deteriorated in terms of access and procurement since the date of their original complaint. *See* Plaintiffs' Mot.

at ¶16, Exs. 5, 6. Inclusion of the supplemental claims will serve to bring these new allegations properly within the scope of the suit. Further, the addition of new class representatives is necessary to maintain proper representation of the claims. *See Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 226, 84 S.Ct. 1226, 1231, 12 L.Ed.2d 256 (1964).

Defendants have failed to establish that serious prejudice will result from the addition of plaintiffs' new claims and class representatives. Final judgment has not been reached in this action, and it is the Court's view that supplementation at this juncture will more clearly and completely reflect the controversy between the parties and will further ensure final settlement of the dispute existing between the parties. In the interest of economy, the Court wishes to avoid the waste of forcing plaintiffs' to file a new and separate suit arising out of facts already familiar to this Court and claims which naturally fit within the case.

For the foregoing reasons, plaintiffs' motion to leave to file first supplemental complaint [Document No. 341] shall be and is hereby **GRANTED**. Accordingly, it is

ORDERED that the Clerk of the Court file Plaintiffs' First Supplemental Complaint and make it part of the record in the above-entitled and numbered civil action. It is further

ORDERED that defendants respond to allegations contained within the Plaintiffs' First Supplemental Complaint within twenty (20) calendar days of the Clerk's filing of the Supplemental Complaint.

SIGNED this 9th day of March, 2001.

s/ William Wayne Justice
William Wayne Justice
Senior United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, PARIS DIVISION DATED AUGUST 9, 2000 AND FILED AUGUST 14, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

Civil Action No. 3:93CA65

LINDA FREW, ET AL.,

Plaintiffs,

v.

DON GILBERT, ET AL.,

Defendants.

MEMORANDUM OPINION AND ORDER

PART ONE: FINDINGS OF FACT REGARDING VIOLATIONS OF DECREE

Background and Procedural History

This civil action, filed on September 1, 1993, concerns the alleged failure of the State of Texas to implement a Medicaid program that assures that indigent children and youth receive timely, comprehensive health care. The case was brought by a class of more than one and one-half million indigent children in Texas who are entitled to health benefits

through the Early Periodic Screening, Diagnosis and Treatment program ("EPSDT"). *See* 42 U.S.C. §§ 1396a(a)(43)[1];

1. Title 42 U.S.C. § 1396a(a) provides:

A State plan for medical assistance must—

. . .

(43) provide for—

> (A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases,
>
> (B) providing or arranging for the provision of such screening services in all cases where they are requested,
>
> (C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and
>
> (D) reporting to the Secretary (in a uniform form and manner established by the Secretary, by age group and by basis of eligibility for medical assistance, and by not later than April 1 after the end of each fiscal year, beginning with fiscal year 1990) the following information relating to early and periodic screening, diagnostic, and treatment services provided under the plan during each fiscal year . . .

1396d(r).[2] In Texas, the program is referred to as the "Texas Health Steps" program, which is administered jointly by the federal government and the Texas Health and Human Services Commission. EPSDT is intended to be "the nation's largest preventive health program for children." H.R. 3299, 101st Cong. § 4213 (1989). It is "among the most important programs that the Texas Department of Health runs." *Order Concerning Fairness of Consent Decree* at 8 (filed January 25, 1996) (hereinafter "*Fairness Order*")(internal quotes omitted).

The purpose of the EPSDT program is to ensure that poor children receive comprehensive health care at an early age, so that they will develop fewer health problems as they grow older. EPSDT is designed to provide health education, preventive care, and effective follow-up care for conditions identified during check-ups. Preventive health care identifies health problems that may respond to early treatment but, if left untreated, may instead lead to serious health conditions. For example, a heart murmur detected during an EPSDT

2. This provision of federal law sets forth the minimum services which the state must provide under the EPSDT program, including: 1) screening services, including comprehensive health and developmental histories, comprehensive unclothed physical exams, appropriate immunizations, laboratory tests (including appropriate lead blood level assessments), and health education; (2) vision services, including diagnosis and treatment for vision defects; (3) dental services, including "relief of pain and infections, restoration of teeth, and maintenance of dental health"; (4) hearing services, including diagnosis and treatment for defects in hearing; and (5) "such other necessary health care . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered by the State plan."

screening, if untreated, could lead to heart failure. Severe anemia, if untreated, could result in behavioral problems and reduced mental capacity. Other important components of the EPSDT program include immunizations, parental education, assistance with scheduling appointments and transportation assistance, and coordination of EPSDT and other programs serving Medicaid-eligible children.

After two years of extensive negotiation following the filing of this case, the parties proposed a partial consent decree to this court in July of 1995. During a fairness hearing held in December of that year, the parties urged the court to approve the proposed decree. The court approved the decree as fair, reasonable, and adequate on February 16, 1996. Per the agreement of both parties, the decree expressly retains the court's jurisdiction to rectify violations of its terms, and provides a mechanism to invoke this jurisdiction. Consent Decree, ¶ 303.[3]

The Plaintiffs' Claims

Currently pending before the court is plaintiffs' motion to enforce multiple provisions of the consent decree with which defendants allegedly have not complied. Specifically,

3. Paragraph 303 provides in full:

303. This Decree contemplates that the parties will reach agreement in the future about several issues. It further contemplates that Defendants' future activities will comport with the terms and intent of this Decree. If this proves to be incorrect, the parties may request relief from this Court. Absent emergency, no party may request relief from the Court without first providing the opposing party with one month's written notice.

plaintiffs allege that defendants have failed to: 1) implement properly the outreach program and deliver required outreach reports; 2) assure that all class members receive medical and dental checkups; 3) develop and implement annual corrective action plans both for counties that lag behind the statewide average for checkups and for the state's medical transportation system; 4) operate the state's managed care system consistently with the mandates of the decree; 5) operate toll-free numbers so as to ensure that all calls are answered promptly by a knowledgeable and helpful staff member; 6) provide case management to all class members who need it, statewide; 7) develop methods to study each agreed health outcome measure; and 8) provide EPSDT training for health care providers.

The Defendants' Responses

Defendants deny that plaintiffs are entitled to any relief sought, and maintain that they are in full compliance with the decree. In addition, they argue that in interpreting the consent decree to require certain specific actions by defendants, plaintiffs seek to modify the decree, and not merely to enforce it. In the alternative, defendants argue that a federal court's jurisdiction over a state official is limited by the Eleventh Amendment to requiring compliance with federal law. Therefore, defendants argue that the decree itself may not be enforced against them to the extent that it goes beyond the scope of simple compliance with federal law.

The Hearing and Memorandum Opinion

A hearing was held from March 13 — March17, 2000, on plaintiffs' motion to enforce the decree, and evidence was

heard on each of the above-listed issues. Following the hearing, the court invited the parties to submit briefs on several of the legal issues involved in this case. Additionally, plaintiffs submitted proposed orders of enforcement, to which defendants responded. The following is a memorandum opinion that grants plaintiffs' motion to enforce the decree in part. Part One of the opinion details the court's findings of fact regarding defendants' specific violations of the consent decree, as interpreted by the court. Part Two addresses defendants' objections to the enforcement of various provisions of the decree. The court's Order of Enforcement accompanies these findings of fact and conclusions of law as a separately issued order.

I. Issue One: Outreach

A. Overview

The decree elaborates in detail the defendants' obligations to conduct outreach efforts aimed at increasing participation and the receipt of needed services. For example, it requires defendants to inform all class members about checkups and other services, and to assist them in arranging for checkups and needed care. ¶¶ 10-74. These decree paragraphs stem from the federal requirement that a state plan for medical assistance that details the state's obligations pursuant to their participation in the federal Medicaid program must "provide for" the "informing" of all eligible recipients of EPSDT services of the availability of those services. 42 U.S.C. § 1396a(a)(43)(A). The decree also requires defendants to provide outreach to "encourage EPSDT recipients to fully use services" and "assist recipients to overcome common barriers that prevent them

from using EPSDT services." ¶ 50.[4] These barriers include the "lack of a health care provider," "communication problems," "transportation problems," and "lack of knowledge" about the program. ¶ 51. As was explained to the court:

> [I]f poor parents understood the concept of prevention and understood the value of having their child seen early and on a regular basis and they understood the outcome they could expect, which is a child with no decay and pretty white teeth and a pretty smile, of course they would [seek services].

TR 252, line 23 to 253, line 14; *see also* TR 308, lines 13-15. (Testimony of Nancy Seale, D.D.S., M.S.D.[5]).

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4. The defendants may provide outreach by use of their own staff or by contract. ¶ 26.

5. With no objection from defendants, the court qualified Dr. Seale as an expert in "pediatric dentistry, oral health conditions, and problems of children, including members of the class and barriers that prevent class members from seeking dental care." TR 250, lines 11-8. Dr. Seale has taught dentistry, and the specialty of pediatric dentistry, since 1972. She has taught primarily at Baylor College of Dentistry in Dallas, where she is now the chairwoman of the pediatric dental program. In addition, Dr. Seale has many years of personal experience with the provision of dental care to class members. TR 248, lines 10-22; TR 328, line 24 to 329, line 3. Dr. Seale is responsible for two hospital-based dental programs for children in Dallas. Also, Dr. Seale is involved at both the state and national level in organized dentistry, and has published extensively in the field of pediatric dentistry. She is a member of the editorial board for *Pediatric Dentistry*. P.Ex. W-6. Dr. Seale was not paid for her testimony. TR 250, lines 9-10.

B. Findings of Fact: Outreach

At issue is defendants' compliance with decree provisions requiring that they maintain sufficient staffing and other resources to conduct outreach "effectively" (¶ 32) and that they "effectively inform" class members about EPSDT services to which they are entitled (¶¶ 11, 52).[6]

Abundant evidence that defendants have violated the decree's outreach provisions was presented to the court. The evidence may be sorted into five categories: 1) evidence of class members' lack of knowledge of defendants' services, 2) evidence related to defendants' transportation system, 3) evidence that plaintiffs do not often obtain services after having received outreach contacts, 4) evidence of plaintiffs' low participation in defendants' programs, and 5) evidence of defendants' insufficient staffing of their outreach programs.[7]

Knowledge and Understanding

Overwhelming evidence was presented — both statistical and anecdotal — demonstrating that large numbers of class members do not know about Texas Health Steps, or do not understand the breadth of services to which they are entitled.

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6. These obligations are discussed in more detail in Section I(C), following the court's findings of fact in this area.

7. Because they implicate different paragraphs of the decree, plaintiffs' related complaints concerning defendants' failure to respond effectively to provider requests for outreach and defendants' failure to report outreach efforts as required by the decree will be treated separately, in Sections I(D) and I(E), respectively.

Appendix D

Numerous witnesses testified to the lack of understanding about defendants' services among class members. For instance, one witness testified about parents who are "overwhelmed with [ ] confusion" about the program. TR 163, lines 8-13. (Testimony of Carolynn Singleton, M.P.H., R.N.[8]). She explained that class members view Medicaid as a program to use only if they become sick. She stated that class members are not aware of the preventive dental services to which they have access, and the transportation services they could use to gain access to such care. TR 162, lines 1-15.

Another witness testified that most class members "do not seem to be familiar with all the services Medicaid provides," noting that class members often do not know how many prescriptions they may receive, have not heard of the medical transportation program, and do not know about eyeglass coverage or dental coverage. TR 19, line 22 to 20,

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8. The court qualified Ms. Singleton as an expert "in the field of preventive and primary care for children who have Medicaid, including barriers to their receipt of health care." She is a registered nurse, and has a master's degree in public health from Tulane University. P.Ex. W-7. Ms. Singleton estimates that she has conducted about 20,000 Texas Health Steps medical checkups over the course of her career. In addition, Ms. Singleton is an owner of Agapé Clinics of Texas, which opened in 1991. Agapé operates four clinics in the Dallas-Fort Worth area. The Arlington clinic alone sees more than 4,000 class members every year. P.Ex. A-8 at 4. Agapé employs three physicians, an optometrist, four nurse practitioners, twelve registered nurses trained to perform Texas Health Steps medical checkups, medical assistants and support staff. TR 183, lines 2-18. Agapé also provides Texas Health Steps checkups for Head Start students in many Texas counties, as well as checkups and primary care for many class members. TR 217, line 5 to 218, line 9.

Appendix D

line 8. (Testimony of Jane McHan, M.S.W.[9]). A third witness also testified that a common problem for class members is that they do not understand their benefits under Medicaid. TR 760, line 20. (Testimony of Carol Tillman[10]). *See also* P.Ex. M-17.

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9. The court qualified plaintiffs' witness Jane McHan as an expert in "the field of social work and case management as it applies to class members, including barriers to class members' receipt of health care." TR 18, line 16 to 19, line 3. She has worked with low-income families for over twenty years. TR 41, lines 13-18. Ms. McHan has been the director of the Parent Case Management Program in Abilene for three years, where she supervises eight case managers. TR 13, line 24 to 14, line 7; TR 17, lines 1-5. She has a master's degree in social work. She TR 16, lines 19-25. She also has taught social work at Hardin Simmons University for over ten years. TR 17, lines 7-11; *see also* P.Ex. W-1. Ms. McHan was not paid for her testimony.

10. The court qualified Ms. Tillman as an expert in "managed care especially as [it applies] to class members, including barriers to class members' receipt of health care." TR 68, lines 5-15. She has fifteen years of experience in the managed care field, including experience in senior management positions with several managed care companies. TR 65, line 10 to 66, line 17. From 1995 to 1997, she served as the vice president and chief operating officer for Community First Health Plans, an HMO that is owned by the Bexar County Hospital District in San Antonio. TR 66, line 18 to 67, line 1. Most of Community First's membership has Medicaid. TR 67, lines 16-21; *see also* P.Ex. W-11. As vice president and chief operating officer, Ms. Tillman oversaw the day to day operation of the HMO and was responsible for probably every department except for medical management and claims. TR 67, lines 6-11. She was responsible for provider relations and member services. TR 67, xlines 12-5. Ms. Tillman was not paid for her testimony.

Echoing the testimony of these experts, a fourth witness explained that

> [t]he families are under-informed about the Medicaid program. They do not understand all the concepts about preventive care. Most of the families do not know what coverage their children have and do not have through Medicaid. . . . Most of them do not understand what a checkup is; they think this means any contact with a medical provider's office.

P.Ex. A-8 at 5 (Deposition of Deborah Skaggs[11]). Furthermore, it was demonstrated that class members do not understand preventive dental care or Medicaid dental benefits:

> [T]he families of the poor children work under the assumption [that] you go to the dentist when you have a toothache, and you go to the dentist when you have a problem, otherwise you don't go. And I think they need to be taught. . . . [T]he ones who haven't been taught don't know what they can expect. They simply don't know, and I think a large percent of [class members'] parents don't know. . . . [O]ne of the single greatest reasons that they don't seek [dental care] is they simply don't know.

TR 253, line 19 to 254, line 11. (Testimony of Dr. Seale).

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11. Deborah Skaggs works at Agapé Clinics with Ms. Singleton. She helps class members to resolve problems with gaining access to Medicaid managed care programs. She has worked at Agapé for about six years. P.Ex. A-8 at 4.

Furthermore, defendants' August, 1998 Outreach and Marketing Report notes that class members "were consistently surprised to learn that Texas Health Steps offers dental and vision care, free transportation and eligibility until age 21." P.Ex. O-1, at 2. This report also indicates that 60% of participating EPSDT clients knew "very little" (12%) or "nothing at all" (48%) about the program. *Id.* at 8. Potential clients knew even less: 70% of those eligible but not enrolled reported knowing very little or nothing at all about Texas Health Steps. *Id.* at 7. The study also revealed that parental confusion about which services they have or have not obtained for their children may operate as a barrier to plaintiffs' receipt of care. For example, class members' families often confuse EPSDT services with other services they may have received, such as services from the Women's Infants' and Children's program (WIC). *Id.* at 8.

Moreover, class members' parents sometimes do not understand what a dental visit is or think their child has had a dental visit when in fact the child has not. TR 274, lines 23-25. (Testimony of Dr. Seale). Parents frequently believe that class members are up to date on checkups and immunizations, when in fact they are not. TR 165, line 10 to 166, line 25. (Testimony of Ms. Singleton). As Dr. Seale noted, when "a parent thinks a child has already had a visit, . . . [but the child is actually overdue for a checkup] . . . they may not follow through . . . because they think the child has already had one." TR 275, lines 10-18.[12]

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12. Defendants' reliance on plaintiffs' loosely conducted survey of class members concerning their knowledge of the scope of EPSDT services is misplaced. D.Ex. 95. That is, the court is persuaded that although class members may think they know the full array of services

(Cont'd)

Appendix D

Transportation

The class members' lack of knowledge of the free medical transportation system is perhaps the clearest example of a failed outreach program. Many of plaintiffs' expert witnesses quoted in the above section testified to this lack of knowledge. The Texas Legislature's Sunset Advisory Commission Health and Human Services Staff Report for 1998 states that "the lack of information about available client transportation services . . . [is] . . . a major barrier to accessing needed transportation." P.Ex. —3 at 115. Furthermore, according to a Texas A & M University study of defendants' transportation program, "[o]n average, recipients who do not use MTP report fewer medical and dental appointments than MTP users." P.Ex. T-43 at 54. However, despite the importance of the transportation program, it is severely underutilized.[13] This underutilization, stems from the failure of the defendants' outreach program to make class members aware that MTP exists:

(Cont'd)

to which they are entitled, they may not actually have been informed fully or correctly. The study also lacks indicia of scientific validity. For these reasons, defendants' 1998 Outreach and Marketing report is found to be a more reliable gauge of class members' knowledge and understanding of the Texas Health Steps Program.

13. MTP services are used by only a small fraction of those who qualify for the service. For example, 98% of those eligible for transportation assistance had not used MTP in the year prior to the survey. P.Ex. T-43 at 54.

Appendix D

> Recipients who did not use MTP simply did not know about the program or the services it provided. . . . [S]lightly more than a third of non-users reported any knowledge of MTP. Of those who had heard of the program, only a small fraction had actually heard of any of the specific MTP funded services.

P.Ex. T-43 at 55.[14]

Receipt of Services after Oral Outreach

The effectiveness of defendants' outreach program may also be measured by the number of class members who opt to receive services after having been contacted by defendants. Because written information and contacts with eligibility workers are not, by themselves, likely to inform all class members about EPSDT services, the decree provides for the creation of "oral outreach units" designed to provide outreach services to those recipients who request additional information, those who miss check ups, and those whose health care provider requests outreach. ¶ 33.

The evidence produced at the hearing suggests that defendants' outreach efforts do not generate particularly high levels of participation among eligible EPSDT recipients.

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14. Defendants report that 63% of the medical transportation program participants were very satisfied with the program. TR 887, lines 2-5. However, this statistic reflects only the degree of satisfaction among the program's users, not the problems relating to the lack of knowledge among the class as a whole as to the program's existence.

Appendix D

Approximately 25% of class members actually receive medical checkups after having received oral outreach services.[15] P.Ex. O-3; *see also* TR 943, lines 19-25. From the start of fiscal year 1999 through June of 1999, the percentage of newly-certified and re-certified class members who received checkups after receiving oral outreach services ranged from about 26% to 38%. The percentage of class members who were overdue for checkups and who received checkups after oral outreach ranged from about 12% to 38%. P.Ex. O-4.

Low Participation Rates

The low participation rates among class members, discussed in Section II(B) of this opinion, also demonstrate that defendants' outreach efforts are ineffective. The fact that participation rates have declined is stark evidence of the ineffectiveness of defendants' outreach program.[16]

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15. Defendants do not record data aimed at measuring the success of dental outreach.

16. Defendants point to declining numbers of clients contacted by outreach staff because they had missed their checkups as evidence of fewer checkups missed by class members. Given the low participation rates cited by plaintiffs in dental checkups and in other medical services, *see* Section II(B), *supra*, defendants' logic is seriously flawed. The decline in contacts for missed checkups might also indicate, as plaintiffs urge, that defendants have failed in their duty to contact plaintiffs after missed checkups, or have failed accurately to compute how many plaintiffs were due checkups.

Appendix D

Insufficient Staffing

Finally, the evidence demonstrates that defendants' failure to conduct appropriate outreach, at least in part, may be attributed to inadequate outreach staffing. Although defendants' outreach obligations to the large number of plaintiffs who had missed appointments should have increased steadily every year from fiscal year 1997 through 1999, there was no concomitant increase in defendants' staffing. P.Ex. O-5. In 1996, one outreach unit staff member served 3,500 class members. P.Ex. O-8.

C. Violations of Decree: Outreach

The evidence weighing against a finding that defendants are in violation of the outreach provisions consists primarily of improvements made after the entry of the decree.[17] The drop in the number of class members overdue for checkups, from 690,868 in 1998 to 629,600 in 1999, could be interpreted as evidence of an effective outreach program. D.Ex. D-101. However, the large number of class members overdue for checkups is more appropriately viewed as evidence of an ineffective outreach program, especially considering that over one million class members did not receive any dental checkups

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17. For example, there were 435,818 outreach efforts made in 1999 — a significant increase from the 152,557 efforts made in 1995. TR 880, lines 12-23; D.Ex. 102. Defendants also rely heavily on D.Ex. D-119, the "Texas Health Steps Outreach Efficacy Study." However, that particular study is found to be wholly unreliable for the reasons cited in plaintiffs' written objections to the report, and will therefore not be considered as evidence contradicting earlier outreach reports prepared by defendants and relied upon by plaintiffs.

in fiscal year 1998. P.Ex. D-3 at 5. The decline thus says very little, if anything, about the overall effectiveness of the outreach program.

The evidence also reveals that the number of outreach contacts increased from 2.3 per class member in fiscal year 1997 to 2.5 per class member in fiscal year 1998, and that the number of outreach contacts has increased each year from fiscal year 1997 to 1999. D.Ex. D-100, D-102. However, roughly two-thirds of these reported contacts were written, not oral, contacts. Despite the effectiveness of home visits,[18] defendants rarely conduct them. P.Ex. O-3. Although the decree does not mandate that a certain proportion of defendants' outreach contacts be home visits, it is found that defendants are not adequately availing themselves of the opportunity to use one of the most effective means of outreach. For example, defendants conducted only 53 home visits in the entire state for the month of March 1999. More importantly, given the strikingly large number of missed checkups — especially dental checkups — defendants' reported increase in the number of contacts would be expected due to the requirement in paragraph 33 that those who miss checkups subsequently receive outreach. In sum, it is found that much of the evidence of improvement is severely undermined by the low levels of success that have characterized defendants' outreach program.[19]

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18. Ms. Singleton testified that, in her experience as a provider through Agapé Clinics, home visits or oral outreach "is the best way to educate . . . and get access." TR 244, lines 2-5.

19. For example, defendants report that the receipt of medical checkups by class members has increased every year since the decree was entered. D.Ex. D-96, D-97, D-98, D-99. Defendants also stress

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Furthermore, it is by no means clear that defendants' progress is at issue, as the decree does not require progress in these areas. In enforcing the consent decree, the court is bound solely by its language. As the Supreme Court emphasized in *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), "the scope of a consent decree must be discerned within its four corners," not by reference to what either party hoped to achieve by the decree, or to what they might have achieved through the litigation of their claims. Under the logic of *Armour*, as derived from the law of contracts, an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree.

There are two major exceptions to the general rule in *Armour*. First, extrinsic evidence may be consulted in interpreting the language of a consent decree:

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that they have recently contracted with Maximus to provide Texas Health Steps outreach and informing. Defendant's $7.6 million contract with Maximus is the largest EPSDT contract for outreach services in the United States, and represents a serious commitment by the state to conduct effective outreach in the future. TR 882, lines 2-4. Defendants will make their outreach efforts more effective by contracting with up to fifty community-based organizations through Maximus. The court is impressed with this massive undertaking. However, while all parties are hopeful that the contract will result in great improvements in defendants' outreach program, this potentiality is not relevant to the court's inquiry into defendants' past and current compliance with the decree.

Appendix D

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the "four corners" rule of *Armour.*

United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975) (footnote omitted). Relying upon general contract principles, courts have interpreted this to mean that "[e]xtrinsic evidence . . . may generally be considered only if the terms of the judgment, or of documents incorporated in it, are ambiguous." *See, e.g., SEC v. Levine*, 881 F.2d 1165, 1179 (2nd Cir.1989). A contract is ambiguous "when it is reasonably susceptible to more than one meaning, in light of surrounding circumstances and established rules of construction." *North Shore Laboratories Corp. v. Cohen*, 721 F.2d 514, 519 (5th Cir. 1983). Whether a contract is ambiguous is a question of law. *Paragon Resources, Inc. v. National Fuel Gas Distribution Corp.*, 695 F.2d 991, 995 (5th Cir. 1983). Once a court determines that a contract is ambiguous, it may look to extrinsic evidence to support its terms. *Eaton v. Courtaulds of North America, Inc.*, 578 F.2d 87, 91 (5th Cir. 1978). Although the determination of a contract's ambiguity is a question of law, determination of the party's intent through extrinsic evidence is a question of fact. *Paragon Resources*, 695 F.2d at 995.

Appendix D

Second, if a statement of purpose is contained in the decree itself, as the product of arm's-length negotiations, and that purpose may be discerned without reference to the extrinsic aims of the parties, *Armour* should not be read to prohibit consideration of that purpose. *See United States v. Local 1804-1*, 44 F.3d 1091, 1098 (2nd Cir. 1995). In the instant case, the various introductory paragraphs interspersed throughout the decree form the relevant backdrop for its interpretation. For example, the overall purpose of the decree is recited in paragraph 6.[20]

Thus, the decree will be interpreted within its "four corners," and its interpretation will be supplemented by extrinsic evidence where ambiguities so require. Consideration will also be given to the purposes incorporated into the decree itself. Therefore, attention must first be given to the language of the decree's outreach provisions put in question by plaintiffs' evidence:

> 11. The parties agree to and the Court orders the following changes to the Texas EPSDT program, policies and procedures to effectively inform recipients about the EPSDT program:
>
> . . .

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20. This paragraph states:

> 6. To address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients, the parties agree and the Court orders Defendants to implement the following changes and procedures for the Texas EPSDT program[.]

Appendix D

32. All outreach units will have sufficient staff and other reasonably necessary resources to handle their workload promptly and effectively.

. . .

52. Oral outreach efforts will effectively inform recipients about EPSDT, including the schedule for medical and dental checkups as well as the full range of covered services. Oral outreach will also effectively inform recipients about the benefits of preventive health care, that services are free of charge, how to locate a provider who is willing to provide services to EPSDT recipients, how to schedule appointments and how to schedule transportation assistance.

The court must determine which of these provisions create binding obligations on the state that, based on the evidence presented, have not been met. Paragraph 11 highlights the fact that the parties bound themselves to the outreach provisions that follow. Paragraph 32 states that all outreach units "will have sufficient staff . . . to handle their workload promptly and effectively." This language is unequivocally mandatory and clearly binds defendants. The only question is, what level of staffing is "sufficient," and what level of resources "reasonably necessary"? While these terms may at first seem vague and difficult to enforce, their meaning is clarified in part by the remainder of paragraph 32. "Sufficient" staffing and "reasonably necessary" resources are those inputs that will permit the "prompt" and "effective" handling of the workload. Paragraph 52, which states that oral outreach

Appendix D

efforts will "effectively inform" recipients about EPSDT, echoes this emphasis on effectiveness. *See also* ¶ 11 ("effectively inform"); ¶ 30 ("Outreach units will work cooperatively with others who serve EPSDT recipients to serve recipients effectively and efficiently"). Thus, paragraphs 32 and 52 state explicitly what the State must do: it must hire enough staff members to permit the effective handling of the workload, and it must effectively inform class members about the program through oral outreach.[21]

What, then, amounts to "effective" informing or serving, or the "effective" handling of a workload? Under *Armour* and its importation of contract law into the interpretation of consent decrees, extrinsic evidence of the parties' intent is to be considered by a court in giving meaning to ambiguous phrases. Defendants appear to suggest that the use of the phrase "effectively inform" in 42 C.F.R. § 441.56(a) should inform the court as to the parties' intended meaning of the phrase in the decree.[22] Specifically, defendants appear to argue that the phrase "designed to," significantly limits their more general duty to "effectively inform." However, defendants'

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21. Paragraphs 32 and 52 relate to the defendants' duty to effectively inform specifically through the oral outreach units required by the decree. However, because it precedes the entire outreach section of the decree — which extends through paragraph 74 and touches on all aspects of oral and written outreach — paragraph 11 makes clear that the duty to "effectively inform" extends to all class members, including those not entitled to oral outreach under paragraph 33.

22. This regulation requires state agencies to provide for a combination of written and oral methods designed to inform effectively. *See* Part Two, Section II(C)(1)(a).

proposed interpretation of this phrase must be rejected as inconsistent with the parties' use of "effective" in the decree. In particular, paragraph 52 does *not* include the phrase "designed to," and instead states unequivocally that defendants' outreach efforts "*will* effectively inform" (emphasis added). The omission of the phrase "designed to" suggests, if anything, that the parties intended to require the defendants to do more than merely plan or design to inform effectively. Therefore, defendants' proposed extrinsic evidence is found to have little bearing on the meaning of "effective" as used in these paragraphs.[23]

The meaning of "effective" can be more clearly discerned by looking at the entire context of the decree, thereby locating and examining possible goals or criteria under which "informing" or the "handling" of a workload might be deemed "effective." *See Alliance to End Repression v. City of Chicago*, 119 F.3d 472, 475 (7th Cir. 1997) (noting that "four corners" inquiry requires a focus on the entire decree, not just a single provision). For example, under one reading of the decree, one might consider informing to be "effective"

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23. It is further noted that, even had the parties provided the court with relevant extrinsic evidence, it would be very difficult, if not impossible, to arrive at the intended meaning of "effectively inform" at the time of the signing. It is more likely that such an endeavor would permit the court to discern only the outer boundaries of a range of behavior intended by the parties to be required of defendants. It is improbable, for example, that the defendants would have bound themselves to effectuate the goal of furnishing all class members with perfect information about EPSDT all of the time. Likely, too, would the plaintiffs have intended the term to mean more than marginal improvements in the status quo at the time of the signing.

if it is simply well-communicated to those plaintiffs who are contacted. This reading would place defendants under an obligation, in the course of their outreach, to be "effective" in instilling understanding or knowledge among those contacted. *See, e.g.*, ¶ 14 ("Information about EPSDT must be relevant to recipients' needs. Information must also be reasonably interesting and presented in a manner that is sensitive to EPSDT recipients' many different cultural backgrounds. . . . Finally, information must be presented in a manner that is convenient to recipients."); ¶ 17 ("Defendants will use letters that are effective and appropriate. They will be printed in English and Spanish."); ¶ 51 ("Common barriers may include [:] . . . misunderstandings/lack of knowledge about Medicaid and/or EPSDT."); ¶ 52 ("Oral outreach efforts will effectively inform recipients about EPSDT, including the schedule for medical and dental check ups as well as the full range of covered services. Oral outreach will also effectively inform recipients about the benefits of preventive health care, that services are free of charge, how to located a provider who is willing to provide services to EPSDT recipients, how to schedule appointments and how to schedule transportation assistance."); ¶ 54 ("Oral outreach will use examples that are tailored to the recipient's age and needs so that information is relevant and interesting to the recipient. When a household includes several recipients of different ages, outreach will provide age appropriate information about each recipient when possible."); ¶ 56 ("Oral outreach will be provided in a manner that is sensitive to recipients' ability to understand and process information. Appropriate language will be used. Sessions will be long enough to meet recipients' needs for information but not so long that they are overwhelming or confusing. The length of sessions will necessarily vary from recipient to recipient.")

Alternatively, other decree provisions suggest that outreach that succeeds in reaching the maximum possible number of people could be termed "effective." *See, e.g.*, ¶ 20 ("Eligibility workers will now be required to discuss EPSDT with applicants who apply for benefits on behalf of an EPSDT eligible person."); ¶ 25 ("But, information about EPSDT provided by TDHS eligibility workers will not be effective for all EPSDT recipients. Oral outreach units will provide outreach services when required."); ¶ 31 ("Defendants will provide outreach services in all areas of the state."); ¶ 49 ("Outreach units will keep current so that they can [ ] provide prompt outreach upon receipt of new Outreach Lists . . . "); ¶ 50 ("The purpose of oral outreach is to encourage EPSDT recipients to fully use EPSDT services; and [to] assist recipients to overcome common barriers that prevent them from using EPSDT services."); ¶ 59 ("Over time, the groups of recipients who require oral outreach should change. . . . The groups of recipients who require oral outreach will increasingly be [ ] newly eligible recipients who have never received oral outreach . . . "); ¶ 73 ("Defendants will arrange for and implement a marketing plan that encourages providers and recipients to participate in the EPSDT program."); *see also* ¶¶ 175-213 (regarding "special groups [that] require special attention so that they can receive the full benefits of the Texas EPSDT program."); ¶ 264 ("The [case management] plan will make sufficient case management available in every county or cluster of counties where few recipients reside."); ¶ 271 ("Medicaid services, including EPSDT services, must be available 'in every political subdivision of the state.' 42 U.S.C. § 1396a(a)(1)."); ¶ 273 ("The parties agree to implement a process to meet the statewideness requirement.").

Still another alternative would be to measure the effectiveness of outreach by its success in persuading listeners to gain access to services.[24] *See, e.g.*, ¶ 10 ("Information about the EPSDT program is important so that recipients can fully utilize EPSDT services, including medical and dental checkups."); ¶ 14 (informing efforts must encourage "recipients to understand and use services fully"); ¶ 17 (written materials must be provided "to explain the EPSDT program and to encourage its use. . . . The reason to include age appropriate information is to provide information that is relevant and interesting to encourage the recipient to fully use EPSDT services."); ¶ 50 ("The purpose of oral outreach is to encourage EPSDT recipients to fully use EPSDT services and assist recipients to overcome common barriers that prevent them from using EPSDT services."); ¶ 64 (defendants may conduct other outreach efforts to "encourage recipients to use EPSDT services"); ¶ 66 (other agencies can help class members to use services); ¶ 73 (media marketing plan must "encourage . . . recipients to participate in the EPSDT program"); *see also* ¶ 178 ("The purpose of outreach to recipients who are children of migrant farmworkers will be to help them to receive as many needed EPSDT services as possible. . . . "); ¶ 183 ("Outreach information will encourage [migrant farmworker] recipients to receive as many needed services as possible. . . . "); ¶ 193 (managed care companies must "cooperate with outreach units so that recipients who miss medical and/or dental checkups receive prompt services"); ¶ 265 (defendants must "encourage the acceptance of case management by recipients.")

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24. The court notes, with disapproval, that defendants do not keep records of those class members who have declined services. P.Ex. CH-23.

Thus, whether "informing" has been done "effectively," or an outreach workload handled "effectively," wholly depends on the goals one hopes to effect. All three of the above-listed outreach goals — facilitating clear knowledge or understanding, reaching the maximum number of eligible class members, and persuading or encouraging class members to obtain care — are present to a large extent in the decree, and were at the heart of the parties' agreement. These are the purposes that appear repeatedly within the "four corners" of the nearly one hundred pages of the decree.

The testimony of several witnesses supports this view of what constitutes "effective" outreach. While these witnesses' individual definitions of "effective" cannot be used as evidence of the parties' intended meaning of the term, they do paint a picture of a commonsense understanding of what it means to conduct outreach effectively that bolsters the court's above analysis and parsing of the decree. For example, one witness testified that defendants' outreach efforts are not effective, based on "the *numbers* of clients that we see in our program that still have *very little, if any knowledge* about Medicaid services and how to access them." TR 25, lines 17-24 (Testimony of Ms. McHan) (emphasis added). Another witness agreed, noting that while "[t]he efforts have been put into place," that she did not "see that they have been *effective*," since a "*large number* of [class members] still don't *understand* . . . the need for repeated [ ] visits." TR 174, lines 18-24; 235, lines 10-19 (Testimony of Ms. Singleton)(emphasis added). A third witness testified that the defendants' outreach program

> is not accomplishing everything that it's intended to. . . . [I]f it were accomplishing what it was intended to do, it would be educating the parents about the value of early checkups, about the value of *keeping appointments* on a regular basis and *getting care* for their children when there was not a problem.

TR 329, lines 8-25 (Testimony of Dr. Seale)(emphasis added). Again, while these comments are not evidence in themselves of what the parties meant by "effective," the witnesses' collective emphasis on the numbers of class members with little knowledge, on the superficiality of their understanding, and on the failure of outreach to result in a significant number of requests for treatment lends further support to the court's assessment of the meaning of the term "effective."

With these background provisions in mind, the precise meaning of "effective" need not be determined. Whether the parties intended it to mean that outreach effectuate the goals of understanding, of reaching maximum numbers of eligibles, or of persuading them to use services, the evidence clearly demonstrates defendants' ineffectiveness in all three senses of the word. First, if the defendants' duty to effectively inform and serve were interpreted to require defendants to effectuate understanding in the minds of those class members subjected to outreach, defendants' August, 1998, "Outreach and Marketing Report" clearly demonstrates their widespread failure to bring about understanding of the program, or even awareness of its existence, among the plaintiff class. P.Ex. O-1, *see also*

Section II(B)(1).[25] If, instead, "effectiveness" is measured by defendant's success in reaching large numbers of the plaintiff class entitled to various forms of outreach, the Outreach and Marketing Report, P.Ex. O-1, is similarly damning.[26] That report clearly demonstrates that defendants have been ineffective in contacting large numbers of class members entitled to oral outreach in an overall effort to inform the population of the program's existence. Specifically, 60% of respondents reported knowing only "very little" or "nothing at all" about the program.

Were the term "effective" read to require some measure of success in encouraging or facilitating recipient participation, defendants' failure would be most dramatic. As noted above, only about 25% of class members who are informed of the program by defendants actually receive medical checkups after having received outreach. These figures are a far cry from "effective informing" if the goal to be "effected" is the actual receipt of care. So, too, are the startlingly low

25. In addition to these cited exhibits, plaintiffs presented credible witnesses who testified to the lack of knowledge among class members of the various services offered by Texas Health Steps. For example, Ms. Singleton testified to class members' lack of knowledge based on her extensive experience in serving class members as a provider.

26. Equally telling is the evidence that the staff-to-member ratios are such that one could not possibly infer that large numbers of class members are being informed, particularly in light of the special barriers to outreach posed by characteristics of the plaintiff class. These barriers are enumerated in the decree itself and were described by plaintiffs' expert witness, Ms. Singleton. *See* Section I(B).

participation rates among class members in key health components in Texas Health Steps, related in Section II(B) of this memorandum opinion.[27]

In conclusion, plaintiffs' evidence aptly demonstrates that defendants have failed to maintain sufficient staff and other reasonably necessary resources to handle their workload promptly and "effectively," and to "effectively" inform recipients about Texas Health Steps. Therefore, it is found that defendants are in violation of paragraphs 32 and 52 of the decree.

D. Providers' Requests for Outreach: Findings of Fact Regarding Violations of Decree

Plaintiffs' concerns about defendants' outreach program include a complaint that defendants have not provided adequate outreach for the recipients whose health care providers request outreach, as mandated by paragraphs 33 and 96 of the decree. They note that under paragraphs 32

27. Whether the goal to be "effected" is to achieve clear understanding among some members of the class, to effect widespread dissemination among the class, to persuade class members to accept medical services, or some combination of these goals which form the textual fabric of the decree, the court adopts a commonsense notion of what *degree* of success in these areas is necessary for defendant's performance to be deemed "effective" under paragraphs 32 and 52 of the decree. Due to the particularly dismal performance rates of defendants under all three interpretations of "effective," the court need not inquire as to whether the state need score an "A+" or merely a "C" to be deemed an "effective" informer. *Cf. King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1059 (2nd Cir. 1995) ("Whatever constitutes 'immediate,' it is certainly less than three weeks.")

and 52, discussed at length above, this outreach must be "effective." However, plaintiffs rely solely on the experience of Ms. Singleton, who requested outreach assistance on behalf of five patients. Defendants responded by sending letters, and then closed the cases. TR 172, line 23 to 173, line 24. While the court finds Ms. Singleton to be a credible witness, her lone account of her experience involving the defendants' arguably inadequate outreach does not establish by a preponderance that defendants have failed to effectively inform this particular subcategory of class members entitled to oral outreach under paragraph 33. Plaintiffs also rely on the fact that in August of 1999, defendants' outreach units answered only 243 providers' requests for outreach. P.Ex. O-3. In certain regions of the state, defendants responded to no requests at all during that time. *Id.* However, the court has not been provided with any benchmark for the number of provider requests to which defendants should have responded. The evidence also revealed that provider requests decreased from well over 2,000 per month during 1998 and 1999 to under 700 in December of 1999. Defendants proffer this decline as evidence that their outreach to providers has had educative effects, while plaintiffs argue that providers are unaware of their ability to request aid and information. D.Ex. 94.

Based on the above evidence, it is found that plaintiffs have not met their burden with respect to this particular group, and did not, therefore, establish a violation above and beyond the violation detailed above, in Section I(C). It is noted that this finding does not in any way affect the above finding that defendants are in violation of paragraphs 32 and 52 with respect to the larger group entitled to oral outreach under paragraph 33.

E. Outreach Reports: Findings of Fact Regarding Violations of Decree

Finally, plaintiffs seek to enforce the outreach reporting requirements at paragraphs 60 and 61 of the decree. Specifically, plaintiffs complain that defendants fail to report separately on outreach efforts made to distinct groups of class members. The court is unaware of any decree provision requiring defendants to deliver the data required under paragraph 60 in a format that distinguishes among subgroups in the plaintiff class. Therefore plaintiffs' invitation to impose the structure of paragraph 33 onto paragraph 60, which sets forth clear and unambiguous reporting requirements, will be declined.

Plaintiffs also maintain that they are entitled to reports about the receipt of checkups after oral outreach that separate medical from dental checkups. Paragraph 61[28] does not, on its face, require defendants to distinguish those class members who receive dental checkups from those who receive medical checkups following outreach, although this would appear to make sense in light of both parties' desire to monitor effectively the outreach program and target specific areas for improvement. Despite the sound logic behind plaintiffs' request, under *Armour*, the court cannot go beyond the language of the decree. Hence, defendants will not be held to have violated paragraph 61.

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28. Paragraph 61 provides that defendants "will develop and implement a method that reports the number and percent of recipients who receive medical and/or dental checkups after receipt of oral outreach."

Appendix D

Issue II: Medical and Dental Checkups

A. Overview

Plaintiffs claim, next, that defendants have not complied with paragraphs 2, 35, 37, and 143 of the consent decree, which outline plaintiffs' entitlements to medical and dental checkups under 42 U.S.C. §§ 1396a(a)(43).[29] These paragraphs provide that class members "are entitled to both medical and dental checkups on a regular schedule," ¶ 2, and "to all needed follow up health care services that are permitted by federal Medicaid law." ¶ 3. Paragraph 143 states that "[d]efendants must provide periodic dental checkups and needed dental services to relieve pain, restore teeth and maintain dental health for EPSDT recipients. . . ." Paragraph 35 describes the schedule for medical checkups as required by the decree;[30]

29. As noted above, this statute, which details the state's obligations pursuant to their participation in the federal Medicaid program, mandates that the state's plan must "provide for" the "informing" of eligible recipients of EPSDT services of the availability of those services, 42 U.S.C. 1396a(a)(43)(A); must "provide for" the "providing and arranging for the provision of such screening services in all cases where they are requested;" 42 U.S.C. 1396a(a)(43)(B); and must "provide for" the "arranging for" corrective or follow-up treatment where the need for such care is disclosed by such screening.

30. Through 1999, the schedule for medical checkups entitled class members to medical checkups at birth, 1-2 weeks, 2 months, 4 months, 6 months, 9 months, 15 months, 18 months, 24 months, 3 years, 4 years, 5 years, 6 years, 8 years, 10 years, 12 years, 14 years, 16 years, 18 years, and 20 years of age. This court's February 28, 2000 order modified paragraph 35 to provide complete medical checkups for teenage class members every year instead of every other year.

Appendix D

the schedule for dental checkups is governed by paragraph 37. Defendants are required by federal law to set these schedules. 42 U.S.C. §§ 1396d(r).[31] Paragraphs 35 and 37 incorporate by reference these "periodicity schedules" created by the state and impose an additional obligation upon defendants to provide oral outreach to recipients who miss a medical or dental checkup "due" or required under such a periodicity schedule. Based on these paragraphs, plaintiffs claim that defendants have failed to provide plaintiffs with needed medical and dental checkups. Plaintiffs claim, additionally, that defendants have failed to provide plaintiffs with adequate reports on the checkups performed on all class members.

The evidence relating to whether defendants have violated these decree provisions is presented below. First, findings of fact relating to the provision of medical checkups are recited. Second, findings of fact relating to the provision of dental services, including those concerning defendants' recruitment of dental providers, are made. Third, defendants' provision of medical and dental checkups to teens is reviewed. Fourth, defendants' provision of checkups to abused and neglected class members is examined. These sections report the court's findings of fact. Section II(C) sets out defendants' violations of the decree in relation to all of these matters. Section II(D) deals with defendants' reporting of data relating to the provision of checkups to class members.

31. Title 42 U.S.C. § 1396d(r) defines "early periodic screening, diagnostic, and treatment services" to include "screening services . . . which are provided . . . at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care . . . " 42 U.S.C. §§ 1396d(r)(1)(A)(i).

Appendix D

B. Findings of Fact: Checkups

Medical Checkups

The evidence at the hearing clearly demonstrated defendants' noncompliance with decree provisions requiring the provision of medical checkups to the plaintiff class. As evidence that class members are not receiving checkups,[32] plaintiffs first point to the defendants' reported medical checkup "participation ratio" for fiscal year 1998, which was .66. D.Ex. D-97. The participation ratio is a "ratio derived by looking at the number of [class members] who have received at least one [checkup] over the expected number of [class members] that should receive a [checkup] during that year." TR 446, lines 6-11. (Testimony of Rick Allgeyer,

32. Plaintiffs presented considerable evidence about the importance of checkups, and the dire consequences to children's health that can result when checkups are missed. This evidence, while compelling, does not bear on the issue of whether or not defendants are in violation of the decree. Additionally, plaintiffs presented evidence of particular children who missed checkups to their detriment. For example, plaintiffs presented the story of a deaf class member who reached the age of seven without having had a hearing evaluation, a mandatory component of a Texas Health Steps medical checkup. They also presented evidence about young class members who had not been tested for lead poisoning, another mandatory component of checkups. P.Ex. M-4 at 2-5, 2-11, 2-12, 2-21. This evidence will be considered as demonstrative of the fact that some class members do not receive the required checkups; however, the court relies more heavily on the statistical evidence discussed in the text above to reach a conclusion about defendants' compliance with the state-wide decree in this action.

Appendix D

Ph.D.[33]). The number of class members who should have received a checkup during the year is adjusted to account for the average period of Medicaid eligibility (about .7 years, or slightly more than eight months) during the year and for the schedule for medical checkups. TR 450, line 18 to 451, line 22. Defendants report this figure annually to the Health Care Finance Administration (HCFA), the federal agency responsible for oversight of the Medicaid program, in a "HCFA 416" report detailing participation in the program. P.Ex. M-39.

Not surprisingly, defendants maintain that actual participation by the plaintiff class in the dental and medical checkup program is higher than the reported statistic. D.Ex. D-96. Plaintiffs maintain that actual participation is lower than reported. More specifically, plaintiffs contend that the participation ratio, computed by defendants in accordance with instructions from HCFA, represents an inflated measure of the actual receipt of services because it is adjusted for the average length of time that class members receive Medicaid during the reporting period.[34] After reviewing the evidence presented, the court is in agreement with plaintiffs that the

33. Dr. Allgeyer, the Director of Statistical Services of TDH, and Program Manager of the Department's Research and Public Health Assessment Division, was certified by the court as defendants' expert in statistical reporting, data collection, and in the analysis and dissemination of federal and state program information.

34. For example, according to a hypothetical presented by plaintiffs, if ten four-year-olds receive Medicaid for only six months (half a year), the participation ratio method mandated by HCFA would reduce the number of ten class members by one-half, to five. Thus,

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reported participation ratios are inflated indicators of the actual participation rates among the plaintiff class.[35]

(Cont'd)
if the ten class members received five medical checkups, the participation ratio would be 1.0, or 100%, despite the fact that only one-half of the ten children eligible for the checkup had received the service. Defendants base their methodology on the assumption that not all of the ten children would be "due" for a checkup during the period of their eligibility, as a four-year-old who had recently received a checkup just before being placed on the Medicaid program would not be "due." Plaintiffs acknowledge this possibility, but argue that the vast majority of newly-eligible class members have not recently seen a doctor; hence, they argue, a more acceptable empirical assumption would be that all ten, or at least some high fraction of the ten, are in fact "due" upon enrollment. It is noted that only a well-supported estimate of the likelihood of a newly-enrolled participant's having recently received a checkup just prior to enrollment will enable the parties to resolve their current disputes concerning the accuracy of the participation ratio as an indicator of actual receipt of services.

35. Defendants also rely on a survey of class members conducted by plaintiffs which showed that in 1998, 91% of class member respondents reported that families in their area were not having problems getting medical or dental care. D.Ex. 95. However, this loosely-conducted survey is found to be highly unreliable. The court finds that the optimistic answers given by class members are most likely to be non-representative of the true state of affairs, given the pitfalls of self-reporting. Nonetheless, despite the irrefutable reality that not all class members receive all, or even any, of the services to which they are entitled, participation rates in the state have steadily increased since the consent decree was approved. For example, in 1993, the (inflated) medical checkup participation ratio was .29. TR 344, lines 14-16. Since that time, the rate has roughly doubled. However, as noted above, defendants' progress per se is not at issue, as it does not fall within the four corners of the decree.

In addition, plaintiffs note that defendants report a shortage of health care providers enrolled in the Texas Health Steps Program. Specifically, in sixty-five of Texas' 254 counties, class members' need for doctors "dramatically exceeds provider to client ratios," while in nineteen additional counties, defendants report "limited provider support for the existing client population." P.Ex. D-13.

Dental Checkups

Services

Abundant evidence was presented that clearly demonstrated that class members do not receive adequate dental care. They crowd emergency rooms in hospitals, suffering from acute forms of dental disease that, while easily preventable, often lead to such health complications as serious oral infections, dehydration, fever, and malnourishment stemming from the inability to eat.[36] In 1998, only 19% of class members received at least one dental checkup. P.Ex. D-3 at 5. This figure declined from 21% in 1997, and rose again to 21% in 1999. P.Ex. D-14.[37] Even fewer class members receive all of the checkups required by defendants' dental periodicity schedule, which entitles class members over age one to a dental checkup every six months. ¶ 37. Although the average period of Medicaid eligibility for class members was slightly more than eight

36. Testimony of Dr. Seale, TR 260, line 19 — TR 261, line 7.

37. The situation in certain regions of the state is even more dire. For example, in fiscal year 1999, only 11.5% of class members in Region 9 over the age of one year received one dental checkup. That same year, in Region 1, only 14.1% of class members eligible for dental checkups received one. P.Ex. D-14.

months in 1998, only 3.7% of class members received the required two dental checkups in 1999.[38] P.Ex. D-14. Particularly disturbing is the statistic reported in defendants' 1998 "State-Wideness Report" that roughly one million Texas Health Steps eligibles had received no dental services for that year. P.Ex. D-3. Furthermore, the number of class members overdue for dental checkups has steadily increased every year between fiscal years 1997 and 1999. P.Ex. O-5.

In 1998, 38% of the class received some form of dental treatment.[39] P.Ex. D-3 at 5. However, the fact that 38% of Texas Health Steps eligibles received at least one dental "service," as opposed to a checkup, is consistent with the program enrollees' tendency to seek dental services only in emergencies. TR 263, line 23 to TR 265, line 7 (Testimony of Dr. Seale). Viewed in conjunction with the insufficient number of children receiving full checkups, the "services" statistic indicates that while class members may be receiving some form of "dental service," they are most likely receiving such services in emergency settings, and are not receiving the preventive services to which they are specifically entitled under the EPSDT program. *Id.*

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38. Dr. Seale testified that this number was "extremely low." TR 256, lines 6-10.

39. It is noted that the parties disagree about the best way to measure the availability of dental services to class members. Defendants believe that dental utilization is best measured by looking at the utilization of all dental services, while plaintiffs appear to focus on the dental checkup as the most important indicia of utilization. It is concluded that the relevant indicator for purposes of plaintiffs' motion to enforce paragraphs 37 and 143 of the decree is the dental checkup, as those paragraphs unambiguously refer to dental checkups.

Defendants emphasize that in 1998, approximately 20% of children enrolled nationally in EPSDT utilized dental services, as compared with 32% of enrolled children who utilized the dental services provided in Texas, a figure which steadily increased during the years 1996 through 1998. D.Ex. D-81. Defendants cite the fact that Texas Health Steps has produced better results than the national average as evidence that defendants have complied with the decree by exceeding any minimum goals contemplated by the parties when they entered into it. However, because Texas provides dental services beginning at age one, whereas many other states begin providing dental services at age three, Texas' higher utilization rates may simply reflect a larger number of eligibles instead of a higher participation rate among eligibles relative to other states.[40] TR 271, lines 1-11; TR 313, line 18 (Testimony of Dr. Seale).

Provider Recruitment

Both parties presented statistics relating to the availability of dentists accepting Texas Health Steps enrollees. Defendants emphasized that while the ratio of dentists to the general

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40. Dr. Seale's testimony also effectively demonstrated that defendants' other main source of dental statistics, the "Make Your Smile Count" study is highly unreliable, as it is inconsistent with the defendants' own "State-Wideness Report," P.Ex. D-3, relies on information reported by parents who are often confused about their children's actual receipt of services and may have psychological incentives to over-report their utilization, and presents shockingly high participation rates that Dr. Seale labeled as unrealistic. TR 323, lines 9-10; D.Ex. D-3, D-107. She concluded that "the statewideness report is probably more realistic." TR 285, lines 19-23. The court, after reviewing the various sources of data, is inclined to agree.

population in the state of Texas in 1999 was roughly 1 : 2,600, the ratio of participating dentists to the Medicaid population was 1 : 584. D.Ex. D-104. However, plaintiffs introduced evidence that of the Medicaid providers identified by defendants, only one-third were "high volume" providers, or providers likely to be able to accept a new enrollee in need of a checkup. TR 268, line 21-25 (Testimony of Dr. Seale); P.Ex. D-12. Defendants' Director of Oral Health, Jerry Felkner, D.D.A., M.P.H.,[41] agreed with this assessment, noting that an enrolled dentist "could see one [class member] a year and still be classified as an active dentist." TR 809, lines 16-25.

In addition, multiple witnesses testified concerning the severe shortage of dentists in various regions of the state. For example, the director of a case management program for children with special health care needs in a large area surrounding Abilene, Texas; testified that many families are having difficulty finding a dentist who will accept Medicaid. TR at 20, lines 7-9. (Testimony of Ms. McHan). A witness from the Texas Migrant Council in Lubbock related that "[a] lot of towns [in the Panhandle] don't have Medicaid providers, either medical or dental. A lot of the time, we . . . have to bus these young children an hour to the dentist." P.Ex. A-4 at 12-13 (Deposition of Nancy Lloyd). The shortage of dentists in the Arlington-Dallas area was also detailed, including the fact that "the dentists are so limited that the referrals that we make need to be for kids that got [sic] abscesses and rotten teeth . . . those are the ones that generally get in." TR 205, lines 4-18 (Testimony of Ms. Singleton).

41. The court qualified Dr. Felkner as an expert in "the dental services provided by the Texas Health Steps program" without objection from plaintiffs. TR 795, lines 7-10.

This shortage of dentists who are willing to see class members is statewide.[42] TR 24, lines 10-12 (Testimony of Ms. Singleton). Defendants themselves agreed in October of 1999 that there were at that time 136 counties in which "the needs of a client population . . . dramatically exceed[ed] provider to client ratios."[43] P.Bx. D-43. Statewide; although about 2,900 dentists are enrolled, only roughly 1,700 actively serve class members. TR 825, lines 4-19. If all class members over the age of one year were to receive the dental care to which they are entitled, it would be necessary that these active dentists each care for 876 class members. This load is not currently being borne by the active dentists. TR 826, line 23 to 827, line 6 (Testimony of Dr. Felkner).[44]

Worse, the number of dentists enrolled in the program is currently decreasing in Texas due to low reimbursement rates and frustration with the defendants' failure to change those rates. TR 330, lines 11-21. (Testimony of Dr. Seale). Low reimbursement rates for dental services from the state makes

42. Ms. Singleton is familiar with class members' problems with gaining access to dental care by virtue of her work with Head Start centers throughout the state. TR 241, lines 4-9; *see also* TR 217, line 5 to 218, line 5.

43. These counties have severe shortages of doctors, dentists, or both. TR 833, lines 16-18. Of these counties, 71 show severe shortages of dentists or of both dentists and doctors. P.Ex. D-13.

44. Plaintiffs calculate that about two-thirds of active Texas Health Steps dentists each cared for fewer than 100 class members over a three-month period. P.Ex. D-12.

the recruitment of additional dentists extremely challenging.[45] TR 824, lines 5-12 TR 823, line 24 to 824, line 4 (Testimony of Dr. Felkner); P.Ex. D-12. Even though defendants admit a severe shortage of dentists exists in 136 counties, defendants propose to recruit only seventy-five additional Texas Health Steps providers (doctors and dentists) during the year 2000. TR 833, line 24 to 834, line 2 (Testimony of Dr. Felkner); P.Ex. D-13 at 1.

Teens

Defendants' failure to provide checkups has a particularly severe impact on teenage class members, for whom the 1998 participation ratio for medical checkups or special adolescent visits was .64. D.Ex. D-9 (11- to 18-year-olds.) Again, such ratios are inflationary because they rest on the assumption that class members receive checkups randomly throughout the year; and do not, therefore, account for the reality that many class members need checkups immediately upon enrollment because they are "overdue."[46] Specifically, in fiscal

45. According to Dr. Felkner, despite the defendants' efforts to recruit dentists into the Medicaid program, the number of enrolled dentists has been "very flat" for four years. Dr. Felkner testified that "[a]s a rule of thumb, overhead expenses run about 65 percent for the average dental practice," although defendants currently reimburse dentists at a rate which is "definitely less than 65 percent." TR 836, lines 2-13. He added that, during the most recent session of the Texas legislature, defendants requested funds to increase dental reimbursement rates by at least 19%. TR 835, lines 5-18. They succeeded in obtaining an increase of about 3.5%. TR 837, lines 9-10.

46. Plaintiffs note, too, that defendants' exclusion of nineteen- and twenty-year-olds raises the reported participation rate for teens, as these older teens receive fewer services than their younger counterparts.

year 1999, only 24% of six- to fourteen-year-old class members received a checkup or adolescent preventive checkup, while only 12.4% of those aged fifteen to twenty years received such a checkup. P.Ex. CH-26. Additionally, because of the expected growth in the number of fifteen- to eighteen-year-old enrollees resulting from the implementation of the new State Children's Health Insurance Program (SCHIP), defendants' failure to provide services to the teenage population is a particularly grave aspect of defendant's extensive failure to serve the class.[47] P.Ex. CH-25.

Abused and Neglected Class Members

Substantial evidence was introduced that demonstrated defendants' failure to address the needs of the roughly 13,200 abused and neglected class members supervised by the Texas Department of Protective and Regulatory Services. The receipt of checkups by this particular population is governed not only by paragraphs 2, 3, 35, and 37, but also by paragraph 212. This paragraph required the parties to submit a Memorandum of Understanding to the Court which would, among other things, "assure that all EPSDT recipients under the supervision of TDPRS receive all medical and dental checkups when due." ¶ 212. The defendants' reports on various subgroups within

47. For example, in fiscal year 1999, less than 19% of the newly enrolled fifteen- to eighteen-year old class members received at least one medical checkup. P.Ex. CH-25. Defendants respond that the participation rate for teens eligible for the Texas Health Steps program has risen from .37 in fiscal year 1996 to its current level. D.Ex. 98. However, as noted previously, it is unclear why defendants progress since 1996 is put at issue by the decree provisions sought to be enforced by plaintiffs.

the larger class of abused and neglected children[48] reveal that this at-risk group does not receive all medical and dental checkups when due.[49] P.Ex. R-11, R-14.

C. Violations of Decree: Checkups

With the above evidence in mind, the court now considers plaintiffs' claims that defendants have violated specific decree provisions. Plaintiffs' primary argument appears to be that, since participation rates in the dental and medical checkup programs are extremely low, defendants have failed to provide the services to which plaintiffs are entitled, and have therefore violated the decree. As noted above, in enforcing the consent decree, the court is bound solely by its language. With this in mind, the court turns to the decree. The paragraphs sought to be enforced by plaintiffs in relation to medical and dental checkups are:

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48. These reports provide information about the children in adoptive placements for the months of October and November of 1999, those in relative placements during the months of August through November of 1999, and those in foster care for the months of July through November of 1999.

49. February of 2000 is the most recent month for which defendants have reported data for this subgroup. For that month, the percentage of class members supervised by TDPRS who missed medical checkups ranged from 27 to 38%, depending on the category of the child's placement. The percent who missed dental checkups ranged from 40 to 60%. P.Ex. R-14.

2. EPSDT is intended to provide comprehensive, timely and cost effective health services to indigent children and teenagers who qualify for Medicaid benefits. Checkups are the cornerstone of the program. They assess recipients' health, provide preventive care and counseling (anticipatory guidance) and make referrals for other needed diagnosis and treatment. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Recipients are entitled to both medical and dental checkups on a regular schedule. About 48% of recipients received at least one medical checkup in fiscal year 1994 (FY94), according to reports Defendants filed with the United States Department of Health and Human Services.

3. Recipients are also entitled to all needed follow up health care services that are permitted by federal Medicaid law. 42 U.S.C. § 1396d(r).

. . .

35. Beginning on September 1, 1995, outreach units will provide oral outreach to all recipients who miss a medical checkup that is due on or after July 1, 1995. "Due" means a medical checkup that is due according to the current Texas EPSDT periodicity schedule, i.e., newborn, 1-2 weeks, 2 months, 4 months, 6 months, 9 months, 12 months, 15 months, 18 months, 24 months,

3 years, 4 years, 5 years, 6 years, 8 years, 10 years, and annually thereafter through and including 20 years of age.[50]

. . .

37. Beginning no later than June, 1997, outreach units will provide oral outreach to all recipients who miss a dental checkup that is due on or after April 1, 1997. "Due" means a dental checkup that is due according to the Texas EPSDT periodicity schedule, i.e., starting at 1 year and continuing every 6 months.

. . .

143. Defendants must provide periodic dental checkups and needed dental services to relieve pain, restore teeth and maintain dental health for EPSDT recipients. 42 U.S.C. § 1396d(r)(3). . . . "

. . .

212. TDH and TDPRS will present a Memorandum of Understanding [that] will . . . assure that all EPSDT recipients under the supervision of TDPRS receive all medical and dental checkups when due.

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50. This schedule reflects a change from the schedule in use when the court originally entered this decree in 1996. At that time, the schedule included biannual medical checkups for teenagers and more limited adolescent preventive visits in the alternate years.

What obligations do these six paragraphs impose upon defendants? First, it is noted as a preliminary matter that paragraphs 35 and 37 are unavailing for the plaintiffs. While these paragraphs do make reference to the state's schedules for medical and dental checkups, they do so solely for the purpose of establishing when the outreach duties are to be triggered, and do not support plaintiffs' claims for timely medical and dental checkups.

Next, paragraph 2 emphasizes the importance of checkups to the overall success of the EPSDT program. The only obligatory language in this paragraph, however, appears in its fourth sentence, where it is stated that "[r]ecipients are entitled to both medical and dental checkups on a regular schedule." Similarly, paragraph 3 states that "recipients are also entitled to all needed follow up health care services that are permitted by federal Medicaid law. 42 U.S.C. § 1396d(r)." The argument between the parties stems from a dispute over the meaning of the word "entitled" as used in these sentences.

Defendants' understanding is that class members are "entitled" to services, but that they must first ask for them. Under this common-sense understanding of the term, argue defendants, plaintiffs must have requested services and have been denied them for defendants to be out of compliance with paragraphs 2 and 3. Plaintiffs presented no evidence of having requested and having been denied services, nor did they argue that the participation data is evidence that some requested services were

actually refused by defendants.[51] Under this understanding of the word "entitled," then, plaintiffs have not met their burden in showing a violation by defendants.

Defendants maintain that this "request defense" is strongly buttressed by the language of the EPSDT statute itself, which requires that state Medicaid plans provide for the delivery of services "in all cases where they are requested." 42 U.S.C. § 1396a(a)(43)(B). It is noted that the requirements of federal law would be irrelevant to this court's construal of the decree under *Armour* but for the fact that the parties elected to incorporate by reference these statutes in the many paragraphs that detail defendants' obligations to plaintiffs, including paragraphs 2 and 3. Therefore, federal law must inform the court's interpretation of these provisions.

Principles of Statutory Interpretation

42 U.S.C. § 1396a(a) provides, in pertinent part:

A State plan for medical assistance must —

. . .

(43) provide for —

(A) informing all persons in the State who are under the age of 21 and who have been determined to be

51. Several witnesses testified that defendants are not aware of a single class member who has requested services and not subsequently received those services. TR 348, lines 22-25; 842, line 22; 437, lines 4-7; 373, lines 1-15; D.Ex. 14.

eligible for medical assistance including services described in section 1396(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) or this title and the need for age-appropriate immunizations against vaccine-preventable diseases,

(B) providing or arranging for the provision of such screening services in all cases where they are requested,

(C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and

(D) reporting to the Secretary . . . the following information relating to early and periodic screening, diagnostic, and treatment services provided under the plan during each fiscal year . . .

Congress has enacted a statute that requires, first, the informing of all people eligible for EPSDT of the benefits to which they are entitled, § 1396a(a)(43)(A); second, the provision of those services wherever requested, § 1396a(a)(43)(B); third, the subsequent provision of

followup or corrective treatment for health problems identified, § 1396a(a)(43)(C); and, fourth, the reporting of data relating to the provision of those services and treatments, § 1396a(a)(43)(D). Plaintiffs' response to defendant's reliance on the "request" language of part B of § 1396a(a)(43) may be summarized as follows: Why should defendants be released from the duty to provide services simply because they have not been formally "requested," when they have violated part (A) by failing to inform members that such services exist?

Structure and Context

The court declines defendants' invitation to read part B of § 1396a(a)(43) in isolation from the rest of paragraph 43 is rejected in favor of the approach dictated by the "Whole Act Rule." Under this rule, a legislature passes judgment upon an act or amendment as an "entity, not giving one portion of the act any greater authority than another. Thus any attempt to segregate any portion or exclude any other portion from consideration is almost certain to distort the legislative intent." N. Singer, *Sutherland on Statutes acrd Statutory Construction*, § 47.02, p. 139, *quoted in* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* (2d ed. 1995) 643. The Supreme Court has expressed agreement with this canon of interpretation: "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.' " *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (citation omitted).

In light of this principle, interpreting the directive to screen upon request in isolation of the context of the entire paragraph would likely result in the significant distortion or misinterpretation of part B. Therefore, the entire paragraph and its structure will be considered. As noted above, the "request" language appears in a four-part directive to the states, which might be rephrased in the following manner: you must inform, you must screen, you must treat, and you must report. This directive is, notably, chronological: it sets out a series of steps in which the population is first told about the program, then screened for health problems, and then given follow-up treatment. As a final step, data is sent back to Washington about the states' performance. In light of this chronological structure, it is presumed that Congress intended for eligible participants in the program to be informed of it before requesting services. That is, although eligible participants' rights to screenings were limited by Congress by the phrase, "in all cases where they are requested," that phrase was intended to refer to those cases where, having first been informed, eligible participants requested services. The meaning and scope of the limiting language are cabined by its location in the structure of the paragraph's chronology.

A parallel phrase appears in part C, which deals with corrective treatment. In that part, states are directed to provide corrective or follow-up treatment, "the need for which is disclosed" in the screenings performed pursuant to part B. This choice of language leads to two conclusions. First, it adds support to the structural interpretation given above, wherein eligible participants are first informed, are given services in all cases where requests are made after having been informed, and are given corrective treatment in all cases where the need

is disclosed after they have been screened. It supports the structure of "A, then B (for which A is a condition precedent), then C (for which B is a condition precedent)." Put simply, the informing was to lead to requests based on information, just as the screenings were to result in treatments based on screenings. Parts B and C are read in this parallel fashion because of their similar grammatical structure and use of sequencing.

A second conclusion may be drawn from the fact that Congress did not choose to limit the provision of corrective treatment in part C by the "request" defense, but instead chose to make corrective treatment available wherever the need was demonstrated through screening. If the "request" language had been genuinely designed to limit defendants' duty to provide screenings even in cases where states had failed to inform eligible participants of the services, why then did Congress choose not to include such a limit on the provision of follow-up services? Why, if the request language was truly meant to limit the states' provision of checkups even where eligible participants had no knowledge of their right to receive regular checkups, did not Congress similarly limit the states' duty to provide follow-ups? Under the statutory principle of "expressio unius," which holds that words omitted, or the decision to omit language, may be just as significant as the decision to use particular words, the omission of the "request" defense in part C should inform the court's understanding of the "request" language in part B. Rather, its disappearance in part C suggests that the phrase was not meant to limit the states' duty to provide screenings in cases where requests were not made due to the states' failure to inform; otherwise, one would expect a similar limitation on follow-up services.

This adds further support for the above-explained structure of "A, then B (for which A is a condition precedent), then C (for which B is a condition precedent)."

Legislative Intent

A brief history of the program will aid the court's interpretation of this section. In 1967, Congress amended the Medicaid Act to provide for the mandatory provision of EPSDT services to needy children under the age of 21. § 1396d(a)(4)(B).[52] The "request" language was first injected into the statute in 1972, when Congress, as part of the Social Security Amendments of 1972, enacted a penalty provision to punish participating states for failing to provide child health screening services under Medicaid.[53] In 1981,

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52. This amendment to the Medicaid statute required participating states to furnish "such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary."

53. 42 U.S.C. § 603(g) (effective October 20, 1972) (now repealed) provided:

Notwithstanding any other provision of this section, the amount payable to any State under this part for quarters in a fiscal year shall with respect to quarters in fiscal years beginning after June 30, 1974, be reduced by 1 per centum . . . of such amount if such State fails to—

(Cont'd)

this penalty was repealed, and the language requiring the informing, provision of screening services, and provision of follow-up treatment was incorporated into a new paragraph, § 1396a(a)(44), which in 1984 became § 1396a(a)(43). The legislative history of the EPSDT program, while scant, clearly indicates that the 1967 amendment was the result of a growing need for health care among poor children. *See* Comment, *Child Health Care: Unresolved Dilemma of Section 1905(a)(4)(B) of the 1967 Social Security Act Amendments*, 59 Geo.L.J. 965 (1971). Early in 1967, in response to this growing need, President Johnson recommended that Congress pass a comprehensive program providing early diagnosis and treatment of poor children with special health care needs. President Johnson, Welfare of Children, H.R.Doc.No.54 (1967).

Whatever might be discerned about the goals of the founders of EPSDT, one may fairly assume that they did not intend to create a means by which states that fail to inform poor and unhealthy children about the program might turn

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(Cont'd)

(1) inform all families in the State receiving aid to families with dependent children under the plan of the State approved under this part of the availability of child health screening services under the plan of such State approved under subchapter XIX of this chapter,

(2) provide or arrange for the provision of such screening services in all cases where they are requested, or

(3) arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services.

around and use this as a defense to their failure to provide services. To the contrary, the "request" limitation was introduced as part of the penalty scheme injected in 1972, which was aimed at penalizing states whose efforts at compliance were less than commendable. More importantly, the "request" language was introduced in conjunction with the duty to inform — a point which concerns the structure of the 1972 and 1981 amendments, discussed above.

It is a fundamental principle of statutory interpretation that a court cannot allow a literal reading of a statute to produce a result "demonstrably at odds with the intentions of its drafters." *Griffin v Oceanic Contractors*, Inc., 458 U.S. 564, 571 (1982). Therefore, it is held that the "request" language may not be read to contravene the congressional intent, in 1967, to enact a program that would serve needy children, or Congress' subsequent intent to strengthen enforcement mechanisms against states that fail to provide those services. Defendants' reading of the "request" language — that the phrase permits them to avoid the duty to provide services where no services have been requested, even in cases where plaintiffs have not been informed so as to be able to make such requests - is in clear conflict with the legislative intent behind the EPSDT statute.

Waiver

The doctrine of waiver undergirds the court's reasoning on this issue. Waiver is an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458 (1938). In the context of criminal law, waiver of the right to counsel and of the right to remain silent must

be voluntary and made knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The principles of waiver extend beyond the criminal context, into the civil context, where waiver is closely linked to the notion of due process. *See Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983) (plaintiffs did not knowingly relinquish their right to a hearing when they were never aware of that right); *Clark v. Schweiker*, 652 F.2d 399 (5th Cir. 1981) (no waiver of statutory right to counsel in hearing before Social Security Adminis-tration where Secretary of Health and Human Services failed to notify claimant of right to representation). Whether a particular right is waivable, whether the defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. *See, e.g.*, 2 W. LaFave & J. Israel, *Criminal Procedure* § 11.6 (1984).

The doctrine of waiver is not, strictly speaking, applicable in the context of plaintiffs' motion to enforce the instant decree; however, its principles form the basis of a useful analogy. In this case, the court is presented with a statutory right to health services, along with a statutory right to be informed of the right to health services. Thus, the right to periodic screenings upon request is unlike most statutory rights, in that Congress has specifically provided a concomitant right to be informed of the right to the services. Thus, this unique statutory right to "services upon request" must be viewed in light of the right to be informed. Because Congress has created the right to know of the right to services, the right to services upon request is, in this sense, akin to the right to remain silent and the right to counsel. Defendants in effect

argue that plaintiffs have waived their right to services by failing to request them. However, under the logic of waiver, which looks to the parameters of the right at stake, the related statutory right to be informed would require defendants to inform plaintiffs of their rights to services before such "waiver," or failure to request, could be considered meaningful.

The Cases

The court's exercise in statutory interpretation supports the commonsense notion that a poor and often isolated population should not be robbed of their rights to services upon request when they have not been informed of those rights. This commonsense notion was first applied to EPSDT in a case in which the defendant State of Indiana defended a remarkably poor record of performance with the contention that "[a]ny of the eligible children in this state can secure all of the requested services merely by requesting them from their local health provider." *Stanton v. Bond*, 504 F.2d 1246, 1250-51 (7th Cir. 1974). Though the Seventh Circuit did not specifically address the "request" language, which was at that time located in a different penalty section of the Social Security Act and therefore did not explicitly limit plaintiffs' rights to services under 42 U.S.C. § 1396d(a)(4)(B),[54] the court made short shrift of defendant's argument:

> It is utterly beyond belief to expect that children of needy parents will volunteer themselves or that their parents will voluntarily deliver them to the

54. *See* above discussion of the enactment of the EPSDT statute and subsequent amendments.

> providers of health services for early medical screening and diagnosis. By the time an Indiana child is brought for treatment it may too often be on a stretcher. This is hardly the goal of "early and periodic screening and diagnosis." EPSDT programs must be brought to the recipients; the recipients will not ordinarily go to the programs until it is too late to accomplish the congressional purpose.

Stanton v. Bond, 504 F.2d at 1251.

Relying on *Stanton*, the U.S. District Court for the District of Columbia has implicitly held that defendants who fail to inform the EPSDT population may also be held to violate §1396a(a)(43)(B) where services have not been provided, even in the absence of requests. *Salazar v. District of Columbia*, 954 F.Supp. 278 (D. D.C.1996). In *Salazar*, Medicaid applicants and recipients claimed that the District had both failed to inform them of EPSDT services and to provide them with the services. Though it did not specifically address the "request" language in § 1396a(a)(43)(B), which was the same at the time *Salazar* was decided as it is today, the court held that defendants had violated both §1396a(a)(43)(A) and §1396a(a)(43)(B). *Id.* at 328-331. Of particular interest is the *Salazar* court's holding that defendants had failed to provide the lead blood toxicity testing of ESPDT children. *Id.* at 330. The court recited, as has this court, numerous statistics in support of the finding that the lead poisoning screenings had not been provided. The *Salazar* court also noted that only one plaintiff with a particularly compelling story had "actually requested" lead blood tests repeatedly

and had been denied. *Id.* at 306. Because this isolated tale of request and denial appears among a sea of statistics supporting the court's legal conclusion that defendants had failed to provide the services, it may be reasonably inferred that the *Salazar* court relied primarily on the failure to provide services, regardless of whether or not they had been requested by plaintiffs. It appears unlikely that the court based its finding of a violation on one plaintiff's story of a denied request, without explicitly saying so. It is more probable that the court's finding that defendant's outreach had been inadequate led the court to find the defendants in violation of §1396a(a)(43)(B) without consideration of the "request" issue, based on the commonsense principles discussed above.

The defendants' logic having been rejected by the court, it is hereby found, based on the evidence recited in Section II(B)(1) above, that plaintiffs have met their burden in establishing that defendants have violated paragraphs 2 and 3 of the decree.[55] Similarly, it is found, based on the evidence relayed in Section II(B)(2) regarding defendants' provision of dental checkups to the plaintiff class, that defendants have violated paragraph 143. It is further found, based on the evidence in Section II(B)(4), that defendants

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55. The evidence related in Section II(B) of this opinion was primarily focused on the provision of checkups, rather than follow-up treatment. However, a finding that defendants have not provided checkups, in violation of paragraph 2, necessitates a finding that follow-up treatments subsequent to those checkups were also not provided. ¶ 3.

have violated paragraph 212[56] in failing to provide the required checkups to children in the custody of TDPRS.

D. Checkup Reports: Findings of Fact Regarding Violations of Decree

Plaintiffs also complain of defendants' failure to report checkup data regularly and accurately. Plaintiffs' argument is three-fold. First, plaintiffs maintain that defendants are in violation of paragraph 284, which requires that defendants report annually the "number and percent of recipients" who receive all of their scheduled medical checkups. Defendants report only "participation ratios" — the figures required by HCFA — instead of actual percentages.[57] Defendants respond that the participation ratios are "professional, statistically valid, and [in conformity] with reporting requirements established by the Health Care Financing Administration (HCFA)." Defendants' Response to Plaintiffs' Second Amended Motion to Enforce the Consent Decree at 11.

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56. The court interprets the language in paragraph 212 cited in Section II(B) to be reiteration or stressing, with respect to a subgroup demonstrated to be at risk of not receiving care, of the defendants' general obligation under federal law to provide checkups to all class members.

57. The difference between these two measures and plaintiffs' concerns about the use of participation ratio are discussed in detail above in Section II(B).

The relevant language of the decree is as follows:

> 283. *METHOD TO REPORT CHECKUPS* First, Defendants report EPSDT participation statistics to the federal government every year on the HCFA Form 416. The HCFA Form 416 uses calculations to approximate the number of recipients who receive EPSDT medical checkups.
>
> 284. Every year from 1996 through 1999, Defendants will also report to Plaintiffs the number and percent of recipients who receive all of their scheduled medical checkups. They will further report the number and percent of recipients who receive all of their scheduled dental checkups. Defendants will provide these reports to Plaintiffs no later than December 31 of each year.
>
> 285. For these reports, Defendants will develop a method that records all recipients who receive the full number of scheduled checkups within a year. . . . The complexities associated with collecting utilization data require the parties' continued collaboration in the design and implementation of this system.

When read in conjunction with paragraph 283, which mentions defendants' pre-existing duty to report participation ratios to HCFA, paragraph 284 requires defendants to provide plaintiffs with more information; namely, "the number and percent of recipients who receive all of their scheduled dental checkups." Defendants' argument that HCFA Form 416 data fulfills their obligations under paragraph 284 is therefore

rejected. Paragraph 284 makes clear that plaintiffs bargained for a very specific type of data in addition to the "calculations" or "approxim[ations]" already required by HCFA. The word "also," in addition to the use of "number and percent" in place of "calculations" makes this plain.

Defendants maintain that plaintiffs have been inflexible in their demands and that the percentages required by paragraph 284 are impossible to obtain. It is true that "[t]he complexities associated with collecting utilization data require the parties' continued collaboration in the design and implementation of this system." ¶ 285. Plaintiffs must therefore collaborate with defendants in their pursuit of the required "number and percent." However, the above-quoted paragraphs make it apparent that plaintiffs bargained for the "number and percent," and not the Form 416 data referenced in paragraph 283. Because they have not furnished plaintiffs with this data, defendants are held to be in violation of paragraph 284.

Second, plaintiffs complain that defendants report information about class members who have received one medical or dental checkup per year, instead of all medical or dental checkups that are due. P.Ex. MC-20. The text of paragraph 284 makes clear that plaintiffs' position is correct. It is found that defendants are in violation for their failure to provide the data specifically described in paragraph 284.

Third, plaintiffs argue that defendants have violated paragraph 212[58] by failing to provide complete reports on the receipt of checkups by abused and neglected children in the custody of the Texas Department of Protective and Regulatory Services (TDPRS). Specifically, defendants' May 28, 1998 report was incomplete, and no complete report was provided until the fall of 1999. P.Ex. R-2. Plaintiffs correctly note that paragraph 212 mandates the reporting of the number and percent of EPSDT recipients "under the supervision of TDPRS" who receive services. Defendants respond that providing this data has been extremely difficult due to unforeseen difficulties. Defendants' Response to Plaintiffs' Second Amended Motion to Enforce Consent Decree at 10. However, this does not excuse defendants' failure to provide the data mandated by the decree. Defendants have failed to cite any decree language that would permit them to exclude certain subsets of those class members "under the supervision of TDPRS." Therefore, it is found that defendants are not in compliance with paragraph 212. Their partial compliance will, however, inform the court in its formulation of appropriate orders of enforcement.

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58. Paragraph 212 requires the parties to create a Memorandum of Understanding that establishes a method to report the number and percent of EPSDT recipients under TDPRS supervision who have received all of their medical and dental checkups, and "assure[s] that all EPSDT recipients under the supervision of TDPRS receive all medical and dental checkups when due."

Appendix D

III. Issue Three: Corrective Action Plans

A. Corrective Action Plans for Lagging Counties: Findings of Fact Regarding Violations of Decree

As is stated in paragraph 271 of the decree, "Medicaid services, including EPSDT services, must be available in every political subdivision of the state." *See* 42 U.S.C. § 1396a(a)(1). To prevent regions of the state from lagging behind others in performance, and to ensure that class members throughout Texas receive the checkups to which they are entitled, the parties created the "State-Wideness" section of the decree. ¶¶271-81. The decree specifies that by March 30th of each year, defendants must report the number of class members who have received medical checkups and dental checkups, by county or cluster of counties. ¶¶ 277, 280. They must then identify any counties that "lag behind" the rest of the state in the delivery of services to the plaintiff class. ¶ 278. Finally, defendants must develop corrective action plans for any so-called "lagging" counties in an effort to improve participation in those counties. ¶ 281.

Plaintiffs allege that defendants have not properly developed annual corrective action plans. Defendants respond that all required corrective action plans for the poorly-performing counties have been completed, and that the issues raised by plaintiffs concerning the particular methodology used by defendants are not governed by the consent decree. Alternatively, defendants assert that their methodology for creating and implementing the plans completely satisfies the standards set out in the decree, were the court to find that such standards exist.

Appendix D

What is "Lagging?"

Plaintiffs are primarily concerned with the methodology used by defendants to identify the so-called "lagging" counties. Plaintiffs contend, first, that defendants label as "lagging" only those counties whose participation rates fall behind the average county participation rate, instead of those counties whose rates fall behind the "state average," as is required by the decree in paragraph 280.[59] As a result, plaintiffs assert, fewer counties are targeted for corrective action than are required to be targeted by the decree. It appears that plaintiffs understand the term "state average" to mean the participation rate for the state of Texas. Defendants respond that "state average" was used in paragraph 280 as shorthand for the average of the participation rates of each of the counties in the state. It is clear from the text of paragraph 280 that defendants' reading is correct. The words "state average" unambiguously refer to an average; therefore, the only question is: the average of what? The only logical answer is the one proposed by the defendants: the average of the county participation rates. Plaintiffs suggest no other average, but insist, erroneously, that the term "state average" should be read as synonymous with the participation rate for

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59. Paragraph 280 provides in full:

280. Defendants will complete a statewideness analysis every year by March 30. Defendants will identify the counties or county clusters that lag behind the state average for medical checkups beginning in 1996 and for medical and/or dental checkups beginning in 1997 and continuing annually thereafter for the duration of his agreement.

the entire state of Texas. This is simply not an average. Ideally, it would certainly be preferable to target for corrective action all counties with participation rates below that of the state; however, the court cannot look beyond the clear language of the decree.[60]

Counties with Few Class Members

Plaintiffs next complain of defendants' decision to omit from the analysis all counties where fewer than 100 class members reside. P.Ex. CH-6 at 5, P.Ex. D-3 at 4. Defendants assert that these counties were excluded from the calculus because their sample sizes were too small. However, the parties obviously anticipated this problem, as the decree specifically provides that "counties where few recipients live may be clustered so that statistically valid results can be achieved." ¶ 276. Nonetheless, defendants insist that "clustering non-adjacent counties" is an "invalid method for developing corrective action plans." Defendants' Response to Plaintiffs' Second Amended Motion to Enforce Consent Decree, at 13. It is unclear why clustering, or grouping the counties with low enrollee counts with adjacent counties with higher counts, would constitute an "invalid" method. Defendants have provided no expert testimony to that effect. Nor is it clear from the court's reading of the decree that the clustering of non-adjacent counties would be required. Regardless, the fact remains that the defendants agreed to

60. This particular phrasing of the decree has significant consequences for plaintiffs. For example, only ten out of Texas' 254 counties were identified by defendants as requiring corrective action in 1998, whereas only 110 of the 254 counties "equaled or exceeded the statewide participation rate." P.Ex. CH-6.

the terms of paragraph 276. There is no provision in the decree for the omission of any county from the calculus. On the contrary, the entire "state-wideness" section is geared toward the inclusion of neglected areas of the state and achieving consistency across the state's vast territory and numerous counties. ¶¶ 271-274. Even had defendants been able to produce expert testimony that clustering is not "statistically valid," within the meaning of that phrase as it appears in paragraph 278,[61] they would likely be bound by their own prior sanctioning of clustering in paragraph 276. Therefore, it is found that defendants are in violation of the corrective action provisions of the decree due to their failure to include counties with few class members. ¶¶273-81.

Managed Care Counties

Plaintiffs also complain of defendants' decision to omit all counties (hereafter referred to as the "managed-care counties") in which defendants require class members to receive services from managed care organizations (hereafter referred to as "MCOs"). P.Ex. CH-6 at 5. Again, as noted above, no provision of the decree permits the omission of certain classes of counties from the analysis. The omission of managed care counties is particularly disquieting, because those counties report lower checkup participation rates than

61. Paragraph 278 reads in pertinent part:

278. . . . Defendants will develop a statistically valid method to determine which counties or county clusters lag behind . . . The method is subject to Plaintiffs' approval. Plaintiffs' approval is limited to whether the proposed method is professionally acceptable and valid. . . . Plaintiffs will not unreasonably withhold approval. . . .

counties in which managed care has not been implemented. *See* Section IV(B)(4). Defendants concede that they are unable to obtain the reliable data that they need in order to include the managed care counties in the lagging county analysis,[62] citing differences in the reporting mechanisms used by fee-for-service entities and managed care organizations as the source of their difficulties.[63] Perhaps anticipating this response, plaintiffs included in the decree a clear mandate that "TDH will assure by various means that the number and percent of EPSDT patients in each managed care organization who receive all medical and dental checkups when due and information for outcomes research as needed is accurately collected." ¶ 191[64]. Notably, Dr. Allgeyre, defendants' Director of Statistics, testified that he was unaware of this provision.

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62. For example, defendants admit that the data in their "Annual EPSDT Participation Reports" is incomplete for the years 1997 and 1998 because managed care data was not obtained. P.Ex. M-32, M-39. It is further noted that the Texas Health Quality Alliance, the agency with which defendants have contracted to obtain independent studies of their managed care initiatives, has reported that the managed care companies serving class members through contracts with the state do not maintain accurate, valid data about the receipt of services, including checkups. D.Ex. D-48.

63. Defendants cite in particular the fact that "reports generated from encounter data are not representative of true utilization due to the movement from a claim basis ([fee-for-service] claim forms submitted for payments) to an encounter data basis (information submitted on capitated services)." Defendants' Response to Plaintiffs' Second Amended Motion to Enforce the Consent Decree, at 28. *See also* TR 460, line 20 to 461, line 5.

64. Defendants' violation of this paragraph is discussed in more detail below, in Section IV(F).

Defendants are under a clear obligation to secure reliable data for the managed care counties and to include them in the lagging county analysis. The decree provides no legal basis for defendants' excuses, which revolve around the alleged difficulty in obtaining data that they explicitly agreed to furnish to plaintiffs.[65] The decree plainly requires the collection of the data at issue and does not provide for the exclusion of managed care counties. Defendants can cite no language in the decree in support of their failure to collect the data, or of their exclusion of said counties. Rather, as was mentioned in the above discussion concerning the counties with low numbers of eligible participants, the state-wideness section must be construed with an eye toward achieving the express goals of inclusion and statewide consistency.[66] Therefore, it is found that defendants are in

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65. Defendants' apparent position that the data collection techniques of the managed care entities are beyond their full understanding or control is further evidence of their recalcitrance, as it is difficult to imagine that any one of the MCOs currently serving the State of Texas would leave behind a lucrative contract were the state to demand the data which plaintiffs seek — data to which plaintiffs are unambiguously entitled to under the decree. And, as the decree makes clear, even though defendants contract with managed care companies to provide services to many class members, defendants "remain ultimately responsible for the administration of the EPSDT program in Texas and compliance with federal EPSDT law." ¶ 300.

66. The portions of the decree dealing specifically with managed care as it affects the plaintiff class provide further support for the court's interpretation that the decree requires the inclusion of the managed care counties in defendants' analysis. *See* Section IV.

violation of the corrective action provisions of the decree due to their failure to include counties in which class members are enrolled in managed care. ¶¶ 273-81.

Checkups vs. Treatments

Plaintiffs assert that defendants fail to report by county the number of class members who receive one or two dental checkups per year. Defendants have instead reported the number of class members who receive "at least one dental treatment." P.Ex. D-3 at 6. Plaintiffs suggest that because the percentage of class members who received dental checkups in 1998 (19%) is significantly smaller than the percentage of members who received any form of dental service (38%),[67] defendants' dental services data do not paint an accurate picture of how many class members are receiving the required checkups by county. Paragraph 277 clearly mandates the reporting of the receipt of dental checkups, not "services."[68] It is therefore found that defendants are in violation of paragraph 277 of the consent decree.

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67. P.Ex. D-3 at 5. A similar gap appears in the 1997 data. *Id.*

68. Paragraph 277 provides in full:

Beginning in 1996, Defendants will measure the percent of EPSDT recipients who receive medical checkups. Beginning in 1997, Defendants will conduct 2 analyses. They will measure the percent of EPSDT recipients who receive medical checkups and 2 dental checkups/year in each county or county cluster.

Professionally Acceptable Data Analyses

Finally, plaintiffs assert that the data in defendants' reports is not "professionally acceptable and valid," as required by paragraph 281 of the decree. The sole evidence for this assertion consists of correspondence authored by plaintiffs' counsel. Because these documents are hearsay, they cannot be considered for the truth of what they assert — that defendants' statistics are unacceptable or invalid. Even were the inconsistencies in defendants' data to be considered by the court, it is found that plaintiffs have not proven by a preponderance of the evidence that defendants have not met the decree's "professionally acceptable and valid" standard. Plaintiffs have provided no guidance for the court to ascertain where the boundary between unacceptable and acceptable might lie. Drawing such a fine would likely be an onerous task. Such fine-tuning will not be necessary, however, as it is hereby found that the very small discrepancies in defendants' data of which this court may take note do not amount to a violation of the standard set out in paragraph 281.

B. Corrective Action Plans for Transportation System

Overview

Plaintiffs allege that defendants have not completed the "Medical Transportation Studies" and transportation corrective action plans required by the decree. The aim of defendants' transportation program is to assist class members, many of whom have no form of transportation,

in coordinating transportation to their appointments.[69] To improve the transportation program, defendants must assess the program by March of each year. ¶¶ 223-29. The aim of these annual evaluations is to assess class members' unmet transportation needs and their satisfaction with the program. In addition, paragraph 228 requires defendants to "take corrective action wherever the assessment indicates that transportation services are inadequate. 'Inadequate' means problem(s) exist that Defendants can reasonably be expected to correct." The decree also orders the parties to determine how to decide where corrective action is needed, how quickly it is needed, and what actions to take. ¶ 229.

Role and Importance of Defendants' Transportation System

The Texas Legislature's Sunset Advisory Commission issued the following statement in a 1998 report:

> Transportation is among the most frequently cited barriers to service delivery for health and human services clients in Texas. Without transportation, clients are unable to access services for which they are eligible. Transportation is a problem primarily for those who do not own a personal automobile, or are unable to drive for other reasons, and thus

69. Defendants offer a variety of transportation services through their contractors. The options include transportation by car, mass transit, bus service between cities, van, taxi, or airline. MTP will arrange transportation to Texas Health Steps checkups, immunizations, dental services and medical treatment for class members. P.Ex. T-6 at 3. Defendants also provide mileage reimbursement at a rate of 28 cents per mile. ¶ 232.

> considered "transportation disadvantaged." This can include people with a mental or physical disability . . . and low-income individuals.

P.Ex. M-3 (Staff Report, Health and Human Services Commission, 1998) at 115. More than one of defendants' witnesses testified that transportation problems are one of the most common reasons that class members miss health care appointments.[70] Plaintiffs' witnesses agreed.[71] A study prepared by Texas A&M University reports that 35% of class members who miss health care appointments give transportation-related problems as the reason for their not having arrived at the scheduled time. P.Ex. T-43 at 27 (Table 5.3).

Findings of Fact Regarding Violations of Decree

Abundant evidence demonstrated the various problems with defendants' transportation program, including evidence that class members often cannot gain access to the transportation

70. TR 380, lines 7-15 (Testimony of Margaret Bruch). The court qualified Ms. Bruch, a program consultant for Texas Health Steps case management as an expert in "medical case management in the Texas Health Steps program and other programs administered by the Department of Health." There was no objection. TR 356, lines 11-6. *See also* TR 975, lines 19-23 (Testimony of Billy Millwee). Mr. Millwee is defendants' division director for the Texas Health Steps and Medical Transportation Programs. TR 872, lines 16-8. The court qualified him as an expert in "the field of health care and . . . the administration of the Texas Health Steps Program." There was no objection. TR 876, lines 7-11.

71. TR 70, lines 13-7 (Testimony of Ms. Tillman); TR 254, line 17 (Testimony of Dr. Seale).

vouchers to which they are entitled, are not reimbursed until months after transportation expenditures have been made, and often spend whole working days arranging and waiting for transportation to and from brief appointments. Some class members, for example, are forced to take one to two days off from work to accompany their children to medical appointments, because the defendants' transportation schedules may require an overnight stay. The burden this creates on poor class members can be overwhelming.[72]

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72. One of many of plaintiffs' examples concerned J.F., who, as the result of having suffered a closed-head injury, has left side neglect, disruptive behaviors, perseveration, learning disabilities, vision problems, problems walking, problems swallowing, and problems with internal control and memory. P.Ex. A-7; TR 34, line 15 to 38, line 19. J.F. had received treatment at the Brown School in Austin, but in December of 1998, he returned home and needed daily therapy sessions at the West Texas Rehabilitation Center in Abilene. He lives about fifteen miles from Abilene, in Merkel. By March, W.P., his mother, still had not received reimbursement for trips made in December. After Ms. McHan's extensive intervention, W.P. finally received reimbursement in April for travel in December.' In the meantime, his mother had to borrow money from multiple sources and quit her job to stay home to take care of her son's extreme needs. TR 38, lines 4-11. W.P. relayed that "[b]ecause of . . . delays, I maxed out my gas credit card. I had to borrow money from all of my friends to pay for trips to rehabilitation five days per week." P.Ex. A-7 at 7. In January of 2000, after a six-month delay, W.P. finally received reimbursement for travel in June of 1999. TR 38, lines 13-19.

Additional evidence of the transportation difficulties faced by plaintiffs will not be recited, as such evidence is irrelevant to the question of whether or not defendants have complied with those

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Under paragraph 223, the first annual assessment of defendants' MTP was due in March of 1996. However, it was not completed by defendants until January of 2000. Because it appears that defendants have not provided plaintiffs with the required annual assessments for the years 1996 through 1999, the court finds that defendants were in violation of paragraphs 223 through 229 of the decree during that entire three-year period. Because defendants completed their first assessment in January of this year, and their first formal transportation corrective action plan on February 25, 2000, it is found that defendants have come into partial compliance with these paragraphs as of the year 2000. However, it is noted that plaintiffs' counsel have not received a copy of the plan or had the opportunity to give their input, as required by the decree. ¶ 229.

IV. Issue Four: Managed Care

The vast majority of the testimony produced at the hearing on plaintiffs' motion to enforce concerned defendants' increased implementation of managed care across the state. A short explanation of what is meant by "managed care" will aid this discussion.

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decree provisions governing the creation of corrective action plans. As plaintiffs themselves concede, the decree does not set out standards for the transportation program itself, but merely sets out a process by which the parties, through the development of corrective action plans, must identify and implement improvements to be made to the program.

Appendix D

A. Defendants' Managed Care Programs[73]

To implement managed care, defendants have used three main managed care "models": capitated managed care, partially capitated managed care, and primary care case management. In capitated fee models, managed care organizations ("MCOs") are paid flat fees by Medicaid to provide services for their patients. TR 99, lines 18-22. The MCO assumes the risk of providing services that are medically necessary. P.Ex. M-2 at 95. The model is based on the theory that when organizations are paid a flat fee to serve their patients, they will provide cost-effective preventive care in an effort to avoid the costs of expensive treatment of acute conditions.

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73. Defendants' most common managed care program is the "STAR" program. There are STAR managed care programs in the Travis, Southeast, Bexar, Tarrant, Lubbock, Dallas, Harris and El Paso regions. P.Ex. MC-57. The STAR program began in 1993 with two pilot projects, one in Travis County and the other in the Gulf Coast area in and around Galveston. In 1995, the Gulf Coast area expanded to include a few new counties. In 1996, Defendants added several counties to the Travis managed care project and started their managed care programs in the Bexar, Lubbock and Tarrant regions. The Harris region project began in 1997. P.Ex. M-2 at 93. Finally, Defendants began their Dallas and El Paso regional projects in 1999. P.Ex. MC-57. By December 1, 1999, Defendants had enrolled 346,388 Texas Medicaid recipients in managed care. D.Ex. D-62. Most managed care enrollees are class members. For example, in fiscal year 1997, 83% of Texas Medicaid recipients in managed care were under the age of 20 years. P.Ex. M-2 at 104. In 1999, the Texas legislature declared a moratorium on the further expansion of managed care for class members and other Texas Medicaid recipients. Tex. Gov't Code, § 533.012; P.Ex. MC-57. However, a future continuation of the "roll-out" of managed care is considered likely by all parties.

Appendix D

P.Ex. —2 at 94. Partial capitation refers to the use of caps for some kinds of services within a single health plan. In primary care case management models, individual health care providers are paid a small monthly fee to arrange referrals and other needed services for patients, but providers are still paid a fee for the services that they provide. Other combinations of these three approaches have been used in some counties. Members of the plaintiff class are enrolled in each of these managed care models.

Each of the three types of managed care programs share several characteristics. First, each class member either chooses or is assigned to a primary care provider (PCP). The primary function of the PCP is to provide each class member with a " 'medical home,' including comprehensive preventive and primary care on a 24 hour/7 day a week basis." P.Ex. —2 at 95. PCPs are also charged with approving other forms of care that class members may need. For example, without PCP approval, class members may not receive most forms of specialty care. P.Ex. —2 at 94, 97. In other words, PCPs are supposed to assist class members and coordinate their care, and also to function as gatekeepers who may limit the care that class members receive. TR 556, line 20 to 566, line 17. Second, managed care involves circumscribed networks of providers and therefore limits clients' choices of providers (with some exceptions) to those under contract with the managed care organization ("MCO") network. P.Ex. M-2 at 95. Third, managed care programs institute utilization review and management programs to monitor network providers. P.Ex. M-2 at 95.

Appendix D

Plaintiffs' complaints regarding defendants' managed care system may be grouped into four areas: 1) the receipt of services by class members enrolled in managed care, 2) the treatment of the children of migrant workers enrolled in managed care, 3) the training of health care providers employed by the managed care system, and 4) the defendants' failure to obtain required data from managed care organizations.

B. Findings of Fact: The Receipt of Services by Class Members Enrolled in Managed Care

Overview

Plaintiffs seek to enforce the following decree provisions to ensure the receipt of services by class members enrolled in managed care programs:

> 189. Regardless of their disagreements about the merits of managed care, the parties agree that managed care must be implemented in a manner that benefits EPSDT recipients and does not harm them. For this reason, the parties agree and the Court orders that:
>
> 190. EPSDT recipients served by managed care organizations are entitled to timely receipt of the full range of EPSDT services, including but not limited to medical and dental checkups.

Appendix D

> 192. TDH will assure by various means that managed care organizations provide medical and dental checkups to newly enrolled recipients no later than 90 days after enrollment except when recipients knowingly and voluntarily decline or refuse services. Managed care organizations will also have the capacity to accelerate services to the children of migrant farmworkers to accommodate their special circumstances. TDH will also assure medical and dental checkups in a timely manner to all recipients.

As a preliminary matter, it is noted that paragraph 189, in which the parties agree "that managed care must be implemented in a manner that benefits EPSDT recipients and does not harm them," does not create any binding obligation on defendants. None of the federal law cited by the parties indicates that the parties meant to refer to a statutory obligation of defendants to the plaintiff class. Rather, paragraph 189 serves as an introduction to the set of obligations that appear in the sentences that follow.

Nonetheless, much of the evidence produced at the hearing focused on the benefits and disadvantages of the managed care approach to healthcare, in Texas and nationally. Defendants emphasized that the principal objectives of managed care are to improve access to health care for Medicaid clients, to enhance the quality of services, to provide a continuum of care and a medical home, to reduce inappropriate utilization, and to enhance long-term cost effectiveness. D.Ex. D-33, D-45, D-46. Plaintiffs countered with familiar arguments about the effects of cost-saving incentives on the quality of

and access to healthcare, emphasizing the harm resulting from class members' inability to understand and navigate defendants' complex managed care system.[74] Plaintiffs also emphasized the lack of "fit" between the realities faced by the EPSDT population and the theory behind the managed care model. The population's poverty makes it likely that they will need many visits, making capitated fee arrangements unprofitable for providers. Also, their relatively short enrollment period removes providers' incentives to provide effective preventive care to keep their patients healthy in the long run. *See, e.g.*, Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 130-33.

Both parties have provided numerous studies depicting varying degrees of satisfaction among providers and consumers in managed care. The breadth and difficulty of the public policy questions they have raised is apparent. While it forms the subject of much debate and discussion in the realm of public policy, the viability of managed care is not, and should not be, on trial in this proceeding. Whether or not to continue the rapid expansion of managed care is an issue for the legislature alone.

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74. For example, Ms. Tillman testified that it is very difficult for class members to get services since "[t]hey don't understand the managed Medicaid process." TR 70, line 23 to 71, line 2; TR 109, line 22 to 110, line 10; TR 111, lines 9-16; TR 116, line 7-11. Ms. Singleton also testified that the advent of managed care has made things worse by exacerbating class members' confusion and frustration in attempting to gain access to healthcare. TR 191, line 20 to 192, line 2.

Relevant to plaintiffs' motion to enforce are the provisions that create binding obligations on defendants. The evidence at the hearing that demonstrated that class members enrolled in managed care do not receive the checkups to which they are entitled under the decree is presented below.

Inaccurate and Inflated Data

First, plaintiffs' evidence demonstrates that defendants' data about checkups in the managed care system is inflated and inaccurate. Specifically, plaintiffs argue that defendants' managed care data, reported in defendants' "Annual EPSDT Participation Report" for fiscal year 1998,[75] are inflated because they include "well child" visits that are not true Texas Health Steps medical checkups. The so-called "well child" visit is considerably less comprehensive than the Texas Health Steps checkup. "The Texas Health Steps checkup is much broader and more involved . . . [than] . . . a well-child exam." TR 175, lines 6-11. (Testimony of Ms. Singleton).[76] In reporting their managed care data, defendants used data that the Texas Health Quality Alliance ("THQA")[77] had

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75. D.Ex. D-42, D-43.

76. Ms. Singleton has personally conducted about 20,000 Texas Health Steps checkups over the course of her career. TR 175, lines 4-5.

77. Defendants contract with the Texas Health Quality Alliance for independent reviews of the managed care companies' performance. Federal law requires external review. 42 U.S.C. § 1396u-2(c)(2); TR 591, lines 14-23; *see also* Decree ¶ 199; TR 541, lines 13-23. THQA uses several methods to evaluate

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obtained from defendants' contractor managed care companies. TR 648, line 20 to 649, line 25. Per defendants' instructions, TR 650, lines 1-8, THQA included in the data two forms of checkups received by class members in managed care: Texas Health Steps checkups and "well child" checkups.

Defendants have not made clear to the court how many of the checkups counted in their Annual EPSDT Participation Report were well child visits, as opposed to Texas Health Steps medical checkups. However, in a "Medicaid Managed Care Report" written for the Texas Legislature for fiscal year 1998, defendants provide participation rate data for their Medicaid managed care plans that includes only Texas Health Steps checkups, and does not include well child visits. P.Ex. MC-5 at 35. These checkup participation rates varied from .24 in Harris County to .39 in the Lubbock managed care region. The participation rates under the primary care case management pilots were somewhat higher, but none

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Defendants' managed care programs. Their on-site review determines what structure and process is in place to meet the requirements of their contract. TR 594, lines 15-23. This study is an attempt to address all of the requirements of the contract by examining their written policy and procedures. TR 595, lines 3-8. THQA also surveys consumers and healthcare providers in defendants' managed care programs. TR 596, lines 16-23. Further, THQA tries to validate data reported by the managed care programs. TR 596. Although THQA had hoped to validate the programs' data by comparing them to actual medical records, often they have not been able to do so. TR 597, line 19 to 598, line 3. In those instances, THQA's validation efforts were limited to attempts to replicate the HMOs' reports using the HMOs' data. TR 596, line 24 to 598, line 3. Finally, THQA conducts focus studies, in which medical records are reviewed. TR 598, lines 7-17.

exceeded .60. P.Ex. MC-5 at 35. These low rates demonstrate the substantial inflationary effect caused by the inclusion of well child visits in defendants' revised 1998 Annual EPSDT Participation Report, which reports participation ratios in managed care ranged from .77 for children of ages 6-14 years, to .46 for those aged fifteen to twenty years. D.Ex. D-42.

THQA Focus Studies

THQA studies reveal that class members have received a startlingly lower number of checkups under managed care than defendants have reported. In addition, THQA Focus Studies[78] find many fewer checkups in managed care than defendants report.[79] Defendants' schedule entitles class members

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78. In particular, plaintiffs rely on a 1999 THQA study which asked whether children, regardless of health status, were receiving periodic screenings and checkups according to a periodicity schedule, whether they were receiving immunizations consistent with standards, and whether they were receiving blood lead screenings periodically. TR 652, lines 20-5. THQA did separate studies of well child care in defendants' Texas Health Network (the model of primary care case management) and defendants' contractor HMOs. The study sampled medical records about class members in each group to determine the rate of checkups, immunizations and blood tests for lead poisoning. The sample was limited to class members up to the age of 28 months who had been enrolled in Medicaid continuously for at least six months. P.Ex. MC-7 at 7; P.Ex. MC-8 at 55.

79. It is noted that the data reported in the "Annual EPSDT Participation Report" is not directly comparable to the THQA data, because the THQA data is limited to class members who had been enrolled for at least 6 months. Also, the medical records used to

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to nine Texas Health Steps medical checkups before they reach two years of age. P.Ex. M-4 at 2-5. However, fewer than 43% of the class members included in THQA's sample of the Texas Health Network data received one or two documented preventive visits in the first two years of life, even if data for Texas Health Steps checkups and "well child" visits are combined. Only about 1% received three or four documented visits. P.Ex. MC-7 at 12. In stark contrast, defendants' "Annual EPSDT Participation Report" states that the participation rate for infants was .82 in fiscal year 1998. D.Ex. D-42. This participation rate purportedly measures the number of infants who received at least one medical checkup for the year. TR 446, lines 4-11. Obviously, the THQA report and defendants' data differ considerably.[80] Reviewing both

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compile the data included all records that the primary care provider had compiled in the class member's file. It is hoped and expected under common medical practice that the PCPs maintain complete records about the class members assigned to their care. However, the focus study reports that some PCPs may not have done so. P.Ex. MC-7 at 12-3; P.Ex. MC-8 at 66-7. The court takes these shortcomings in the comparability of these data sets into account, and concludes that this comparison is just one of many bits of evidence that demonstrate, by a preponderance of the evidence, that class members in managed care do not receive the timely checkups to which they are entitled.

80. Plaintiffs presented other dismal THQA findings, including the fact that no documentation of any checkups for over one-half of the class members in the Texas Health Network could be located. "[O]ver 50% of received records per [region] had no documentation of either Texas Health Steps/well child checkups, immunizations or lead screening." P.Ex. MC-7 at 12. This data is very troublesome

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sets of data and the evidence presented at the hearing related to the accuracy of both sets, it is found that plaintiffs' reliance on the THQA studies is not misplaced. It is also found that plaintiffs' explanations for these disparities — the inflationary effect of the assumptions used in calculating the participation ratio and of the arbitrary inclusion of well child data in defendants' reports, along with the MCOs' inaccuracies in data collection and reporting — are highly persuasive.[81]

Comparing Managed Care and Fee for-service Systems

Third, plaintiffs have shown that class members enrolled in managed care receive fewer checkups than those enrolled in the traditional fee-for-service plans.

Plaintiffs argue that, by design, many managed care healthcare systems include incentives that motivate providers to limit healthcare visits. The results of this alleged incentive structure, they claim, may be seen in a comparison of managed care data with fee-for-service data. For example, in fiscal year 1997, defendants reported lower participation ratios for

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because defendants' most recent report to the Texas Legislature notes that there has been an increase in the number of "complex" newborns within almost all of their managed care plans. The percent of complex newborns is higher among the population enrolled in defendants' managed care programs than in the fee-for-service population. P.Ex. MC-5 at 25, 32-3.

81. Plaintiffs note, in addition, that had THQA been permitted to review medical records instead of administrative data to validate the medical checkups, the disparities between THQA's findings and the data reported by defendants would likely have been even greater.

class members in managed care than for those in fee-for-service Medicaid, with the exception of infants.[82] Similarly, defendants' most recent data about medical checkup participation rates — the revised "Annual Participation Report" for fiscal year 1998 that includes data from their managed care contractors — shows that with the exception of infants, class members in managed care have lower participation ratios than class members in fee-for-service plans.[83] D.Ex. D-42. A recent internal memorandum authored by defendants reports that "[t]he most recent FY'99 percentages

82. In some regions, the screening ratios for infants were better in managed care than in fee-for-service, although this was only marginally true for all managed care regions combined. P-Ex. MC-22.

83. This data shows that managed care enrollees receive fewer services even with the inflationary factors discussed at length above. Defendants stress the fact that the disparity among the fee-for-service and managed care participation ratios is not extreme; however, due to the problems with defendant's managed care data set, the court finds this argument unconvincing. A more accurate set of data would likely reveal greater disparities between the two subgroups. Defendants also compare the screening ratios for class members enrolled in managed care and those enrolled in fee-for-service plans. D.Ex. D-43. This exhibit shows screening ratios that are the same or higher for class members in managed care, when compared with class members in fee-for-service. However, it was found above that this data is plagued by various inaccuracies likely to lead to inflationary biases. Therefore, the court is not convinced that class members in managed care are receiving the same number of screens and other services as those in fee-for-service plans. For example, defendants report that the screening ratio for infants in fee-for-service is .83 and for infants in managed care is .82. But, based on the studies conducted by THQA described above, it is found that defendants' .82 figure is inaccurate and highly unreliable.

for Texas Health Steps medical exams in the nine pilot Medicaid Managed Care counties of Region 1 remain significantly lower than percentages in these same counties prior to implementation of the pilot." P.Ex. M-20 ("Region 1 Highlights").

Incomplete Checkups

Fourth, the "checkups" received by managed care plaintiffs are grossly inadequate and incomplete. As discussed above, the parties agree that some class members receive "well child" visits instead of checkups. These visits are less comprehensive than Texas Health Steps checkups, and do not substitute for the full checkups required by federal law, by decree paragraphs 190 and 192, and by defendants' own policies.

It takes about one hour to complete an initial Texas Health Steps checkup and about forty-five minutes to complete subsequent checkups. TR 188, line 23 to 189, line 8 (Testimony of Ms. Singleton). It takes about twelve to twenty minutes to perform Texas Health Steps checkups for infants, while "older children [take] longer." TR 759, lines 17-20 (Testimony of Dr. Beverly Koops[84]). The evidence also revealed that twelve minutes would be "pretty quick" and that it would be difficult to complete five Texas Health Steps checkups in under one hour.[85] TR 930, line 20 to 931,

84. Dr. Koops is defendants' medical director for Healthcare Financing. TR 743, lines 14-5. She is a neonatologist. TR 745, lines 3-4.

85. Also, Ms. Tillman testified that it takes an additional 30 to 45 minutes to explain managed care to class members. TR 116, lines 12 to 117, line 1.

line 6 (Testimony of Mr. Mllwee). However, Medicaid patients in managed care receive only "nine to ten minutes with a primary care provider actually seeing the patient." TR 114, lines 20-4 (Testimony of Ms. Tillman); *see also* P.Ex. MC-42, complaint of class member B.C. (dated August 25, 1999, documenting receipt of a ten-minute appointment), complaint of class member D.R (dated November 11, 1999, complaining of a one- to two-hour wait "every time" and of a five- to ten-minute doctor visit), complaint of class member J.S. (dated November 30, 1999, complaining of a two-hour wait, and only "about 2 minutes" with doctor).

Finally, THQA's studies demonstrate that class members in managed care receive less immunization and lead testing[86] than they should.[87] Specifically, THQA found that less than

86. Defendants agree-that class members' healthcare visits only "count" as Texas Health Steps checkups if all elements of the checkup are completed. P.Ex. —5 at 39-3. In addition, Congress has recognized the importance of immunizations and blood tests for lead poisoning by requiring that they be mandatory checkup elements. 42 U.S.C. §§1396d(r)(1)(B)(iii) (immunizations); 1396d(r)(1)(B)(iv) (blood tests for lead poisoning)

87. Plaintiffs also introduced evidence of other elements that checkups within the managed care system may be lacking. P.Ex. CH-24, complaint of class member L.G. (dated July 29, 1998, Texas Health Steps checkup not done adequately, shots not given), complaint of class member L. S. (dated July 31, 1998, doctor refused to do thorough checkup, burden on mother to find specialty care, child later diagnosed with cystic fibrosis), complaint of class member J.H. (dated August 12, 1998, doctor refused to give immunizations, saying he would not get paid), complaint of class member A.M. (dated August 12, 1998, child's head not examined during checkup, later diagnosed with brain tumor).

17% of class members in the Texas Health Network were documented as having been fully immunized by the age of two. P.Ex. MC-7 at 12. The HMOs report that less than 50% of enrolled two-year-olds are fully immunized. P.Ex. MC-8 at 65.[88] The THQA study also showed that class members, who are entitled to blood tests for lead poisoning at twelve months and again at twenty-four months, were in large part not receiving this vital service. P.Ex. M-4 at 2-5, 2-21.[89] Only 15.5% of the sampled medical records of the class members enrolled in the Texas Health Network confirmed the receipt of even one blood test for lead poisoning during the first twenty-eight months of life. P.Ex. MC-7 at 12. Less than 2% of class members had medical records that showed two or more tests, as is required for children aged two years. P.Ex. MC-7 at 12. The lead test reports are also unfavorable for those class members enrolled in HMOs. Less than 30% of enrolled class members received a blood test for lead poisoning by the age of two, and only about 9% had received two or more tests. P.Ex. MC-8 at 65.[90]

88. Furthermore, in 1998, defendants reported to the Texas Legislature that only 22% of 24-month-old class members in managed care were fully immunized. P.Ex. MC-23 at 11-25.

89. Defendants admit that "childhood lead poisoning is one of the most common and preventable pediatric health problems in the United States today," P.Ex. OM-9, "Texas Health Steps Program Outcome Measures, Percent of Children with Blood Lead Levels Greater Than or Equal to 15 ug/dL by Race/Ethnicity." Moreover, poverty is associated with an increased risk of lead poisoning. P.Ex. CH-1 at 2.

90. Other evidence indicates that defendants include checkups that are incomplete with regard to lead screening in their managed

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Appendix D

Problems with the Medical Home and Primary Care Provider Models

Fifth, class members' timely receipt of full EPSDT services is impeded by the failure of the "medical home model," in which a single primary care provider (PCP) acts as gatekeeper. Defendants claim that their managed care programs improve healthcare for class members through the application of the dual concepts of the "medical home" and the "primary care provider," or "PCP."[91] Plaintiffs counter that these concepts fail plaintiffs in their application, and prevent the timely receipt of EPSDT services by class members enrolled in managed care plans.[92] Plaintiffs' criticisms of the PCP/

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care data. Dr. Ron Jemelka, THQA's research director, testified that in their 1997 report, THQA reviewed a small sample of managed care medical records. TR 605, line 1 to 606, line 20; P.Ex. MC-1, "Focus Studies State Summary" at 19. THQA found that the managed care companies'ltdr-epartedre-tead'screening questionnaires than the medical records reflected. *Id.*

91. For example, Dr. Koops testified that PCPs are a strength of defendants' managed care system. She stated that class members in managed care enjoy having their own personal physician, which they had not had before managed care came into being for the Medicaid population. TR 755, line 11 to 756, line 3; *see also* TR 709, lines 10-2.

92. For example, Ms. Singleton testified about class members whose care was delayed because of the structure of managed care. According to her testimony, defendants' implementation of managed care programs has worsened class members' access to care. TR 191, lines 20-23. Ms. Singleton and her staff have communicated the

(Cont'd)

Appendix D

medical home model are two-fold: first, that class members often have neither a medical home nor any knowledge of their PCP, and second, that PCPs often refuse to treat class members, forcing them to seek care in local emergency rooms.

The PCP

When some class members arrive at various healthcare clinics, they do not know the name of their PCPs. TR 193, line 23 to 194, line 2 (Testimony of Ms. Singleton). The confusion caused by the difficulty in identifying class members' PCPs leads to delays in the receipt of needed care.[93] One witness relayed that

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perceived problems with managed care to defendants "on a regular basis." They have talked with defendants' local staff, defendants' staff in Austin and staff of the HMOs. They have even "brought it to the governor's office attention that children were not getting the care that they needed." TR 203, lines 14-22. But, according to Ms. Singleton, "[t]here has not been a lot of progress made" toward the resolution of the problems she has observed. TR 203, lines 23-25.

93. *See* P.Ex. MC-42, complaint of class member M.R. (dated February 2, 1999, claiming that although PCP had been changed two months earlier, doctor still refused to see child until Medicaid ID form had been corrected), complaint of class member R.L. (dated March 30, 1999, claiming that due to PCP change, mother could not find out from managed care plan where she could take her child for a Texas Health Steps checkup); complaint of class member V.H. (dated July 7, 1999, stating that members of doctor's staff called NHIC at time of child's appointment, and were told that another doctor was child's PCP), complaint of class member C.R. (dated July 7, 1999, reporting that defendants' representative incorrectly told doctor that he was not PCP when child arrived for appointment).

many families have trouble getting primary care for their children who have Medicaid. Lots of families find out their children's Primary Care Provider has been changed without their knowledge or permission. Then, sometimes they can't get care from the Primary Care Provider assigned to them. Sometimes, their children get assigned to providers who don't see patients their age at all; these providers just refuse to see them or they send them to us even though we're not the Primary Care Provider. Both Maximus and the HMOs told us these problems would get better after managed care had been here for a while, but they have not gotten better.

P.Ex. A-8 at 7 (Deposition of Ms. Skaggs).

Based on this evidence, it is found that the PCP model is currently functioning as a barrier to the timely receipt of care for many class members. The following section demonstrates that the problem is not merely administrative.

Crowded Clinics and Emergency Rooms

One clinical provider testified that class members visit clinics even though their PCPs practice elsewhere. According to her testimony, "[W]hen they come to us, . . . they have called their primary care provider and they can't get in to see them for an extended period of time." TR 195, lines 3-5

(Testimony of Ms. Singleton).[94] Clinics are not the only places where class members seek care when the doors to their "medical homes" are locked. It was hoped that managed care would force class members to receive services outside of emergency rooms. TR 752, line 2-6; TR 755, lines 9-19. However, class members enrolled in managed care often seek care in the ER. The Tarrant Regional Advisory Committee on Managed Care has reported ongoing problems with class members who arrive in the emergency room without ever having seen their PCPs. P.Ex. MC-48. Also reported were problems with PCPs who, "despite having received monthly cap payments, do not feel that they should be required to see that client on an urgent care basis." *Id.*[95]

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94. *See also* P.Ex. MC-42, complaint of class member M.O. (dated April 23, 1999, claiming that PCP refused to see member because member was under the age of 12), complaint of class member J.A. (dated June 29, 1999, in which PCP refused to see child because of outstanding bills for others in the family), complaint of class member R.V. (dated July 12, 1999, stating that doctor covering for PCP while PCP was out of town refused to see child), complaint of class member K.W. (dated August 24, 1999, stating that despite child's being sick for a week, PCP would not schedule appointment), complaint of class member E.M. (dated September 3, 1999, alleging that PCP refused to see "very sick"child because mother did not speak English), complaint of class member C.R. (dated October 13, 1999, stating that PCP refused to see child with "bad eye infection" and "bleeding eyes" because of "lack of ID card.")

95. *See also* P.Ex. MC-50; P.Ex. MC-42, complaint of class member K. C. (dated January 22, 1999, reporting that a "child having seizures" was refused by provider unless health plan immediately changed), complaint of class member M.R.G. (dated February 4, 1999,

(Cont'd)

Appendix D

In October of 1999, the Tarrant committee discussed the problems that occur when the "PCP incorrectly perceives [the] ER as a quicker way to obtain specialist evaluation for stable children." P.Ex. MC-49. They noted the following:

> What many PCPs do not realize, however, is that this does not result in a quicker appointment with [a] specialist unless the child is acute when he appears in the ER. . . . [T]hese referrals are partly a result of the cumbersome referral process under Managed Care. . . . [T]he PCP sends the client to the ER out of frustration with the system.

P.Ex. MC-50. The committee discussed problems that arise when the "PCP perceives the ER as a place to send children who are sick when his own office is overloaded — a result of a lack of Medicaid providers." P.Ex. MC-49. The committee also noted the shortage of specialists in the Tarrant region. "There is a lack of access to outpatient mental healthcare. There are not enough providers for behavioral health and mental health, and the impact is that the members go to the emergency room.[96] P.Ex. MC-51 at 2-3.

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complaint that, for the second time, PCP refused to see "very sick" child), complaint of class member C.G. (dated November 11, 1999, complaint that PCP not available to see child who was vomiting and having problems breathing).

96. The impact of managed care on plaintiffs' access to mental healthcare services is discussed in more detail below.

Appendix D

Access to Specialists

Sixth, defendants' managed care programs impede class members' access to specialists. HMO provider referral handbooks are often inaccurate, since many specialists listed in the HMOs' referral books are not taking Medicaid patients.[97] Class members face remarkable difficulties in finding specialists who will accept EPSDT enrollees in managed care plans. For example, Agapé Clinics has reported "major problems" finding specialists to take care of class members.[98]

Part of the problem appears to lie with the HMOs' internal approval processes. For example, Ms. Singleton described a 17-month-old who was assigned Agapé Clinics as his newly-designated PCP. He had recurrent ear infections. "[B]etween the time . . . he was three weeks old, which is real early to start ear infections, and when he came in to see us, he had been on regimes of antibiotics . . . 17 [times] before we saw him." TR 202, lines 1-6. After Agapé staff treated the boy

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97. TR 203, lines 8-10 (Testimony of Ms. Singleton). Ms. Singleton testified that "[v]ery, very many of [the listed HMOs] are not [taking new Medicaid patients]. They are not participating in the program." TR 200, lines 7-14.

98. Ms. Singleton told the story of one patient who broke his arm at school. According to Ms. Singleton, "it took us just under eight weeks to get him into an orthopedist specialist for treatment. . . . [T]here was difficulty in getting an appropriate referral through the managed care system to get him in for treatment." TR 199, lines 7-13. During the 8 weeks while he was waiting for treatment, the class member was in a sling and on restricted activity. TR 199, lines 10-11. When he eventually received orthopedic care, he needed a pin and surgery. TR 199, lines 14-16.

three more times without success, they asked the HMO for approval to send him to an ear, nose and throat specialist. The boy was not referred because he had not met the requirements of the HMO that Agapé, as the primary care provider, must have treated him six times within six months.[99] TR 202, lines 7-12.[100]

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99. *See also* P.Ex. MC-42, complaint of class member V.H. (dated December 1, 1998, claiming that despite growing "knot" on child's neck discovered during September Texas Health Steps checkup, child was still waiting for promised referral to specialist), complaint of class member K.C. (dated December 7, 1998, claiming that emergency room merely splinted child's arm due to lack of pediatric orthopedist in network), complaint of class member S.N. (dated January 15, 1999, claiming that HMO denied referrals for child with rare disease because relevant needed specialist "does not accept PCA."); complaint of class member P.H. (dated March 10, 1999, reporting experience of family trying for three weeks to get a referral to a neurologist), complaint of class member B.B.S. (dated June 29, 1999, reporting that although doctor's office reported baby's need for cardiologist, HMO refused out of network request and had "no pediatric cardiologists in network"). The Harris regional advisory committee on managed care has also expressed concerns with the authorization process for follow up appointments with specialists, noting that since the referral process differs among the HMOs, it can lead to confusion. P.Ex. MC-46.

100. The recurring themes of Ms. Singleton's testimony were confirmed by Ms. Skaggs, who spoke also of an additional problem: the billing of class members for services that EPSDT should have coverred. P.EX. A-8 (Deposition of Deborah Skaggs). *See also* P.Ex. MC-42.

Access to Pediatric Care and Mental Health Services

Seventh, defendants' managed care system impedes class members' receipt of pediatric care and mental health services.

The Dallas regional advisory committee on managed care noted in May of 1999, that there were only fifty-three pediatric providers in the entire Dallas managed care area. It also reported a "pediatrician shortage" in which "[t]here are 6 counties which have either 1 or 0 pediatricians." MC-52 at 5-6. This shortage was reported to have persisted as late as October of 1999. P.Ex. MC-53 at 9. Some pediatricians do not enroll in defendants' managed care programs because the "rates are too low, the hassle factor is high, and they are afraid the dam would open up," and they would be swamped with Medicaid patients. *Id.*

Defendants' system of managed care is also impeding class members' access to mental healthcare. One physician and member of the Tarrant regional advisory committee on managed care commented:

> [T]hey are losing services that were available three years ago; there are fewer hospital beds for children and adolescents. . . . Mental health is the least served area. If there is high demand, then the providers can select their patients. They're going to select patients where they will get reimbursed appropriately. Taking a system that is weak to start with in its reimbursement and

> making it more difficult to administer, places further demands on those providers. They are going to drop out of the system.

P.Ex. MC-51 at 6; *see also* P.Ex. MC-53 at 10.[101]

THQA Provider and Consumer Surveys

Eighth, plaintiffs present THQA studies that purport to demonstrate that providers themselves view defendants' implementation of managed care as having a detrimental effect on plaintiffs' receipt of timely care. THQA surveys reveal that more healthcare providers are dissatisfied than satisfied with the impact of defendants' managed care program on class members' access to care and continuity of care. P.Ex. MC-11 at 7. Surveys do show that physicians' satisfaction with Medicaid managed care increases the longer they are in the program.[102] However, this increase could be the product of many other variables besides physicians' increased satisfaction with class members' access to care. The survey results could indicate that physicians who are dissatisfied with defendants' managed care program simply drop out. The most that can be said, given the data presented, is that the majority of providers currently believe that defendants' implementation of managed care has had an adverse impact on class members' access to services.

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101. The Dallas committee also discussed problems with access to mental healthcare for class members, noting concerns about "the adequacy of the mental health network for children, especially children with complex needs. . . . " P.Ex. MC-54 at 12.

102. TR 723, lines 1-4. (Testimony of Susan Milam, Chief of the Bureau of Managed Care).

Plaintiffs also rely on THQA's 1999 survey of consumers, which shows that many class members experience difficulty receiving necessary healthcare from defendants' managed care programs. For example, 32% of respondents said that they had problems "getting the care" they needed from defendants' STAR HMOs. Similarly, 27% of those enrolled in the Texas Health Network said that they had problems. Of those enrolled in STAR HMOs, 18% said they had "big problems" getting care; in the Texas Health Network, 16% reported "big problems." P.Ex. MC-9 at 11. However, it is not entirely clear what conclusions may be drawn from this particular study. A simple rephrasing of its findings reveals that 85% of Medicaid patients in managed care have no problems or only "small problems" getting care that they need from the managed care companies. TR 543, lines 19-21; TR 706, lines 1-13; D-Ex. 35.

THQA also asked consumers how often they received care without long waits. More than 50% of STAR HMO respondents reported long waits before they could receive care. Fully 26% responded that they "sometimes or never" got care without long waits. In the Texas Health Network, 49% reported waits for care; 24% reported that they "sometimes or never" received care without long waits.[103] P.Ex. MC-9

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103. Plaintiffs argue that defendants' managed care contractors themselves contribute to these delays. For example, THQA's 1999 study found that managed care companies' staff are improperly educated about which services they are required to cover for class members. THQA found that managed care member services staff gave incorrect answers when THQA surrogate callers asked for information about how to receive services that they needed. *See e.g.*, P.Ex. MC-14

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at 12. Once again, rephrasing the findings, the study demonstrates that 71% of respondents received care without long waits. One witness opined that these results are "excellent." TR 707, lines 13-23; D.Ex. D-40 (Testimony of Ms. Milam). Thus, neither the THQA provider surveys nor the survey of consumers are particularly helpful with regard to the issue of whether managed care class members receive timely checkups without problems. It is found that the data is susceptible to varying interpretations.

Self-Reporting by Class Members

Ninth, the accounts of three individual class members who were directly, adversely impacted by the structure of managed care poignantly illustrate the predicament of class members who are denied the timely receipt of services to which they are entitled under the decree. These accounts form the final category of evidence on which the court bases its finding that defendants have failed to provide class members enrolled in managed care with the checkups and other services to which they are entitled.

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at 50, 57; TR 601, lines 8-10. When managed care member services staff give out incorrect information, argue plaintiffs, they function as a barrier that impedes class members' access to the full range of services that federal Medicaid law guarantees to them. The same is true for managed care members services staff's responses to THQA surrogate callers' calls about medical emergencies. For example, staff at one HMO told a caller conducting an emergency scenario that the mother would need to call back with an ID number and details of symptoms. Defendants' obligations to provide training to managed care providers are discussed below, in Section VI(E).

B.M. and Samantha

Class member Samantha has "developmental delays, cerebral palsy which manifests itself in gross and fine motor skills problems and speech problems, learning disabilities (predominantly non-verbal), severe Attention Deficit Hyperactivity Disorder, asthma and airborne allergies, chronic ear infections, and pituitary dwarfism." P.Ex. A-5 at 5. B.M., her mother, explained that she has had problems obtaining all of the care that Samantha needs:

> Now Samantha is in a Medicaid HMO. It is hard to get medical appointments for her in a timely way. Sometimes when she is sick, the doctor's office tells me that all the appointments are full and she can't get one for approximately two weeks. When this happens, we can't go to another doctor. Also, the HMO representative told me that if I take Samantha to the emergency room, it had better be a true life threatening emergency. She said if it's not, I have to pay the bill. That is very scary. I don't know when her problems can wait and when they can't, especially when it takes so long to get an appointment.

P.Ex. A-5 at 7. B.M. also has trouble obtaining specialty care for Samantha. Her HMO only contracts with one orthopedist who is qualified to handle Samantha's problems. However, B.M. sought the help of a second doctor. She "looked and looked but there was no one else. The HMO people would not even answer my questions about trying to find another orthopedist." P.Ex. A-5 at 7. Furthermore, problems with

prior approval of Samantha's physical and speech therapy have "caused delays in Samantha getting the therapy she needs," P.Bx. A-5 at 7, and there is a shortage of physical therapists in Samantha's HMO. Her mother reported, "I called and called and called before I could find a physical therapy agency signed up with my HMO. Most physical therapy agencies told me Medicaid paid too little to be worth it." P.Ex. A-5 at 7-8.

C.H. and Sons

C.H. characterizes her experiences with Americaid, one of defendant's managed care contractors, as a "nightmare." P.Ex. A-1 at 6 (supplemental deposition). C.H. is the mother of three young class members: Jonathon, who has manic depression, oppositional defiant disorder and attention deficit disorder; James, who has mild mental retardation, asthma, oppositional defiant disorder and affective disorder, and is sometimes violent; and Jacob, who suffers from serious kidney disease and asthma.

C.H. has encountered significant difficulty in obtaining healthcare for James and Jacob. First, the psychiatrist who had been treating James "dropped all his Medicaid patients." P.Ex. A-1 at 6 (supplemental deposition). Americaid initially told C.H. that she did not need a referral code to take James to a new psychiatrist. Americaid later refused to pay for his care because C.H. "did not follow procedure about getting a referral code." P.Bx. A-1 at 6 (supplemental deposition).

On one occasion, C.H. took James and Jacob in for emergency care because they both were suffering from fevers and diarrhea. "They kept vomiting and they were both getting dehydrated. I was very scared because they are so young and Jacob just had no weight to lose he has so many other health problems." P.Ex. A-1 at 6. The hospital refused to see the boys without a referral code from their HMO or payment from C.H. P.Ex. A-1 at 6-7.[104] "We then went . . . to another emergency room where I was scolded for not getting the children to medical attention sooner. They said each of the children had lost several pounds, and it was dangerous to let this happen. They had to give Jacob intravenous fluids." P.Ex. A-1 at 7.

Shortly before C.H. gave her deposition in March of 2000, James suffered a serious and prolonged asthma attack. C.H. called the doctor's office repeatedly from about 2:00 p.m. Saturday until 3:00 a.m. Sunday morning, finally reaching a nurse who instructed her to take him to the nearest emergency room. There, it was determined that James' situation was critical. Says CH:

> I feel terrified and helpless when my child is in such bad shape and I have no way to do anything about it. I absolutely couldn't go to another doctor when that one didn't call me back, because we are in a Medicaid HMO. I was in fear of being turned away if I took him to the emergency room

104. According to one emergency room doctor addressing the Tarrant regional advisory committee, "managed care recommends" that staff "refuse to see" some Medicaid patients who seek care there. P.Ex. MC-50.

> without a referral code. . . . The worst thing is I expect it to happen again; my children are still in a Medicaid HMO and they still have chronic illnesses.

P.Ex. A-1 at 7.

C.H. has also experienced difficulty obtaining a psychological evaluation for Jacob. "[W]e are trying to get some help but it is really hard to find someone to do it because he is in a Medicaid HMO." P.Ex. A-1 at 8. By the time that C.H. had found someone to perform Jacob's psychological evaluation, she had changed the boys' PCP. To C.H.'s surprise, she learned that James and Jacob's HMOs had also been changed, and that their former doctors would no longer accept them as patients. P.Ex. A-1 at 8. C.H. expects further delays because of the amount of time it takes to change Medicaid managed care plans. P.Ex. A-1 at 8. *See also* TR 192, lines 18-25.

C.O.

Plaintiffs also report a serious problem with delays in providing necessary medical equipment in their managed care programs in Harris County. Class member C.O. is a junior high school student with serious disabilities because of cerebral palsy. He was enrolled with HMO Blue in Defendants' STAR Plus managed care program for people with disabilities. P-Ex. C-21. When C.O. outgrew his wheelchair, he encountered difficulty in trying to get HMO Blue to replace it. According to C.O.'s school therapist,

> the chair is desperately needed to promote independence of C.O. and to help him get from classroom to classroom. This is his last year in Junior High, and the High School is much more difficult to maneuver. This is also a safety issue. [C.O.] has no trunk control and he doesn't have protective responses, so if he falls he has no way of breaking the fall or protecting himself. . . . At the present time parents are propping chair up with wooden blocks — which is also not safe — he recently fell from his chair at home due to imbalance of chair and the physical reasons stated above. His current chair is three years old — his knees protrude and he has to have extra seat belts. This is particularly difficult for transport. The school bus driver has to double strap him to chair, and has difficulty moving him on and off the school bus.

P.Ex. C-21.

It took more than a year for C.O. to get a replacement wheelchair. P.Ex. C-21 (internal TDH e-mail dated January 13, 1999). Among the causes of C.O.'s untimely receipt of care listed by defendants in the internal memo were the fact that C.O.'s mother did not speak English and the fact that HMO Blue's policies concerning wheelchairs were stricter than other Medicaid HMOs. *Id.* Under 42 U.S.C. §1396(d)(r)(5), however, C.O. was entitled to receive the full range of services that he needed, including a wheelchair.

Unfortunately, C.O.'s troubles are not unusual. THQA's 1999 STAR Plus consumer satisfaction survey shows that, on average, 43% of respondents report problems obtaining special medical equipment, and 27% of respondents report having had "a big problem" in obtaining special medical equipment. HMO Blue had the worst record of defendants' contractors, with one-half of respondent enrollees reporting problems and one-third reporting "big" problems receiving medical equipment. P.Ex. MC-9 at 35.

C. Violations of Decree: Receipt of Services by Class Members Enrolled in Managed Care

In light of the data presented to this court and set out in Section IV(B), it is found that defendants have violated paragraphs 190 and 192 by failing to provide timely checkups to class members enrolled in managed care.[105] While the courts applauds defendants' efforts to encourage the managed care organizations to take steps toward reaching the goals of

105. More specifically, the court finds that defendants have are in violation of paragraph 190 for the failure to provide the "timely receipt of the full range of EPSDT services, including but not limited to medical and dental check ups," and of paragraph 192 for failing to "assure medical and dental checkups in a timely manner to all [managed care] recipients." Because no evidence was presented indicating that defendants are in violation of the requirement that they ensure the provision of checkups to new managed care enrollees within 90 days after enrollment, the court makes no finding with regard to that portion of paragraph 192.

the decree,[106] and while it is hoped that such new initiatives will be met with success, these efforts do not excuse defendants' current noncompliance.

D. Children of Migrant Farmworker Families

The Problem

In drafting the decree, the parties took special care to identify certain subsets of the class that have historically been denied adequate healthcare. Paragraph 192, which states that "[m]anaged care organizations will also have the capacity to

106. Defendants point to a provision in the "1999 Contract for Services between TDH and HMO," D.Ex. D-45, as evidence of their good-faith efforts to comply with paragraphs 190 and 192 of the decree. However, paragraphs 190 and 192 unequivocally mandate that class members enrolled in managed care receive the full range of EPSDT services to which they are entitled, and paragraph 300 makes clear that the ultimate responsibility for fulfilling the duties under paragraphs 190 and 192 lies with defendants:

300. Defendants may contract with individuals and entities to provide EPSDT services. But, Defendants remain ultimately responsible for the administration of the EPSDT program in Texas and compliance with federal EPSDT law.

It is noted that a 1998 THQA report found that one-half of defendants' managed care contractors did not substantially meet the requirement that they have systems in place to ensure the delivery of THSteps services. TR 611, fines 8-14; P.Ex. MC-2, MCO On-Site Survey, State Summary at 6. In addition, evidence was presented that indicated that defendants had found one MCO, Community Health Choice, in violation of the contract in the year 1997; sanctions, however, were delayed until the year 2000. P.Ex. MC-43.

accelerate services to the children of migrant farmworkers," is an example of the parties' early identification of a group that might be adversely affected by the installment of a managed care system. All parties agree that the acceleration, or speedy delivery, of services to this group of class members is crucial to their receiving adequate care, given their frequent migration and high rates of illness.[107]

Class members whose parents are migrant farmworkers face many health problems, including serious dental problems and lack of dental care, lice, lack of immunizations, dehydration, pesticide exposure, agricultural accident-related injury, nutritional problems such as anemia and lead poisoning, and health problems commonly associated with severely substandard housing. P.Ex. A-4 (Testimony of Nancy Lloyd).[108]

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107. Migrant farmworker families are typically found in four of TDH's regions: Regions 1, (Panhandle), 8 (San Antonio and Wintergarden areas), 9/10 (El Paso) and 11 (South Texas). Class members are enrolled in managed care programs in three of these areas: Regions 1, 8 and 9/10. TR 955, line 13 to 956, line 24.

108. Ms. Lloyd is the health specialist for the Texas Migrant Council (TMC) of the Panhandle region. TMC's Head Start programs provide educational and health services to students, including daily breakfast, lunch and snacks. TMC serves a large area in the Texas Panhandle. Its Head Start centers are located in Lubbock, Hale, Pecos, Deaf Smith, Reeves, Floyd and Bailey Counties. P.Ex. A-4 at 5-6. During the summer season, the centers serve about 450 children. P.Ex. A-4 at 7. The students are children up to five years of age whose families are mobile migrants who have moved interstate or intrastate within the last year to engage in agricultural employment. P.Ex. A-4 at 5. About 80% of TMC's students are on Medicaid. Most

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It can be very difficult for class members whose parents are migrant farmworkers to receive the healthcare that they need, since farmworkers' children often need to be transported to doctors or dentists whose offices are an hour or more away. There are hosts of local doctors and dentists in close proximity who do not accept Medicaid clients. P.Ex. A-4. Educating parents about their children's' needs is also crucial. For example, Ms. Lloyd arranged appropriate physical and occupational therapy for a two-year-old class member who had cerebral palsy. Prior to this arrangement, the child had been receiving only two sessions per month even though he needed three sessions per week. Before Ms. Lloyd's intervention, the child

> was losing muscle mass. . . . he couldn't even hold his head up but after two weeks of therapy he could. Also, you're fighting a time clock here. If children don't learn to walk by the time they're

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of their older siblings are also on Medicaid. P.Ex. A-4 at 7. As the health specialist, Ms. Lloyd is responsible for helping TMC's students to receive medical and dental checkups and needed treatment.

At the December 1995 hearing in this case, then-EPSDT Program director Ernie Schmid testified that migrant farmworkers are "perhaps the most underserved population in the world." P.Ex. M-1 at 136. According to then-Defendant Commissioner of Health David Smith, M.D., problems that characterize the children of migrant farmworkers include acute respiratory disease, parasites and intestinal diseases, skin problems, and malnutrition. P.Ex. B-15 at 156-60. Gloriana Lopez, D.D.S., defendants' then-Dental Director stated that "the migrant population seems to have a higher degree of dental disease . . . the amount of decay is more and the amount of untreated decay is more. . . . " P.Ex. B-11 at 49.

> three years old, they probably never will. . . . If someone had been following this child, this never would have happened. He had been getting two visits per month for a year before he came to our center. He had Medicaid during this whole time. I want to know why no one helped him to get the full therapy that he needed.

P.Ex. A-4 at 13-14. He also did not have a standing frame so that he could strengthen his muscles to learn to walk. "The mother wanted help but she didn't know what options were available or what her child needed. This was one of the saddest cases I've seen." *Id.*

Ms. Lloyd testified that this subgroup's pattern of migration made obtaining care through EPSDT managed care extremely difficult:

> The HMOs would tell the parents that they would register the children with the [primary care providers], but they never would do it. So, the children would never get a local PCP while they were in our area. They'd be stuck with their PCP from wherever they were before, which would do them no good while they were here, or else they wouldn't have one at all. Without a PCP, they were locked out of the system, because the PCPs have to provide or approve all of the care. A lot of times, the HMOs would register the children with a PCP just as the family was moving on to a new job out of our area, or after the family had left. . . . This happened a lot.

P.Ex. A-4 at 19.[109] Defendants' Chief of the Bureau of Managed Care, Susan Milam, agreed that it is important to accelerate services for class members whose parents are migrant farm-workers:

> [T]hey oftentimes will not reside in a particular area for a long period of time, if you are concerned about a child getting the necessary immunizations or series of checkups that they need, that by the time they become eligible, get enrolled, et cetera, that they may only have a chance to have maybe one or two services rendered to them before they move to another location. . . .

TR 732, lines 12-21.

Findings of Fact Regarding Violations of Decree

Despite the increased health risks faced by class members whose parents are migrant farmworkers, much evidence suggests that defendants have not adequately ensured that their managed care contractors make efforts to accommodate them. The managed care companies in the counties of Lubbock, Crosby, Floyd, Hale, Lamb and Lynn counties lack the capacity to accelerate services for migrant farmworker

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109. Ms. Lloyd illustrated this phenomenon with the example of a young migrant farmworker class member in Dallas in need of plastic surgery because her outer ear was deformed and she had no ear canal. "We could never get this organized before they left. There was no one to help us to make the complex arrangements, including the managed care organizations, [who] were no help at all." P.Ex. A-4 at 13.

class members. P.Ex. A-4 at 15-16. According to Ms. Lloyd, the managed care companies "don't do anything to accelerate services for our children. . . . [or] . . . for other children of migrant farmworkers . . . who have Medicaid." P.Ex. A-4 at 16. Ms. Lloyd reported that she has tried several times with no success to help the managed care companies accelerate services to TMC students and their siblings. She first asked the managed care companies to be part of TMC's Health Services Advisory Committee. "They said they would but then they never showed up for any meetings." P.Ex. A-4 at 16. She then asked them to make presentations to TMC parent groups to "give the families a chance to learn about what the managed care programs do and how they work," but they have not yet agreed to do so. P.Ex. A-4 at 16.

In short, there seems to be no evidence that defendants' Panhandle area managed care companies make any efforts to accelerate services to class members whose parents are migrant farmworkers:

> If they do, they have never explained them to me or my staff. If they truly wanted to speed things up for migrant farmworkers' children, you'd think they'd want us to understand how their programs work, and you'd think they'd want to cooperate with us. We're one of the largest programs for the children of migrant farmworkers in this area, and almost all of our students have Medicaid.

P.Ex. A-4 at 16. (Testimony of Ms. Lloyd).

The problem is statewide. In 1998, ten of the thirteen managed care plans were not in substantial compliance with the requirements relating to the acceleration of services to migrant populations. P.Ex. MC-2, 1998 THQA "MCO On-Site Survey," at 3. Most plans had difficulty identifying migrants since they were not identified on the plans' enrollment tapes. *Id.* Apparently, only three of the thirteen managed care companies with whom the state contracts use assessment tools that specifically identify migrant farmworkers. P.Ex. MC-41. These findings in the THQA report were corroborated by comments made by several of defendants' managed care contractors about their abilities to accelerate services for children of migrant farmworkers.[110] TR 607, line 21 to 608, line 21. Defense witness Ms. Milam

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110. These contractors commented:

- "We really need TDH or DHS to assist the MCO's identifying migrant workers. . . . " (CHC)
- "With regards to the screening of migrant workers on the HMO Blue Medicaid health plan, we currently do not do anything extraordinary that we would [not] do for any other member." (HMO Blue)
- "The difficulty in assuring acceleration of services results from inability to identify these Members upon enrollment." (MethodistCare)
- ". . . this information is not asked at the time the client qualifying for Medicaid eligibility w/DHS." (MSCH ACCESS)

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testified that the managed care companies have a great deal of trouble identifying class members whose parents are migrant farmworkers.[111] TR 734, lines 12-15.

Defendants point out that the Medicaid managed care plans do have the "capacity" to accelerate services to class

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- "We will cooperate, and coordinate with TDH to develop strategies and perform outreach to secure prompt delivery of service to the migrant population as soon as they are identified." (Parkland)

- "... it was the understanding ... that [food stamps] was the only state program that maintained this information." (PCA)

- "At this time, Seton Health Plan does not have a policy & procedure addressing identification of migrant farm workers specifically." (Seton)

- "The state does not give migrant populations a separate membership risk group nor are they identified in any way on the enrollment file." (AmeriHealth)

- "The MCOs are unable to identify these members without assistance from the enrollment broker or the state." (FirstCare)

P.Ex. MC-41 at 3-4.

111. Ms. Wain also testified that defendants have not yet been able to determine if the Texas Department of Human Services identifies migrant farmworkers during its interview process. TR 734, line 21 to 735, line 1. Thus, defendants themselves do not currently know how many class member children of migrant farmworkers are assigned to each of their managed care contractors. P.Ex. A-10.

members "when these members are identified."[112] However, the evidence clearly demonstrates that the process of identification is severely flawed, if not completely nonfunctional. Paragraph 192 states unequivocally that the managed care organizations "will ... have the capacity to accelerate services to the children of migrant farmworkers." It is held that a managed care organization that fails to identify class members whose parents are migrant workers does not have the "capacity" or working ability to accelerate services to them, and that defendants are, therefore, out of compliance with paragraph 192.[113]

112. Defendants' Chief of the Bureau of Managed Care, Susan Milam, TR 696; lines 6-14, testified that the managed care companies have the capacity to accelerate services to class members whose parents are migrant farmworkers, even though the companies cannot identify the children. She explained that "capacity" means "that if an individual is identified ... as being in a certain category, ... the plan has the internal structure or infrastructure in place that they can respond quickly." TR 718, lines 3-6.

113. Defendants report that the children of migrant families are particularly hard to identify due to many factors, including the population's own unwillingness to self-identify. Dr. Koops testified that it can be difficult to identify migrant farmworker families because it would be improper to pry into this issue. TR 775, line 4-776, line 11. This reluctance has proven to be a large obstacle to defendants' progress in fulfilling their duty under paragraph 192. However, whether migrant farmworkers are willing to be identified or not depends, at least in part, on whether the agency itself is threatening or welcoming. P.Ex. A-4 at 20. Ms. Lloyd's experience at TMC shows that the task of identification can and should be accomplished.

Appendix D

The court is aware of defendants' good-faith efforts, and will consider them in its formulation of enforcement orders. Nevertheless, the court may not stray from the task of enforcing the language of the decree. A "capacity" to serve this subset of the class, which the court has found to be all but wholly lacking, must be in place.[114]

E. Training of Healthcare Providers in the Managed Care System: Findings of Fact Regarding Violations of Decree[115]

In drafting the decree, the parties were particularly concerned about training providers within the managed care system:

> 194. TDH will assure by various means that managed care organizations arrange appropriate training for all healthcare providers and their staff who serve EPSDT recipients . . . All will be trained about program requirements relevant to their responsibilities, including the relevant terms of this settlement.

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114. It is noted that a system that effectively identified and offered the acceleration of services to migrants who then refused to take advantage of such acceleration would satisfy defendants' paragraph 192 obligation. However, until proper identification and education of this subgroup has been conducted by the MCOs, it is held that the requisite "capacity" has not been developed.

115. Training for healthcare providers, which is to be provided by defendants and is not limited to providers within managed care organizations, will be discussed in Section VIII.

Appendix D

The rationale behind provider training is that providers are often the people best situated to explain which services are available to their patients. For example, if providers are unaware of class members' entitlement to free transportation through the Medical Transportation Program, they will not be able to direct their patients to the program when they coordinate appointments and follow-up visits. Or, if providers are not familiar with all elements of the EPSDT checkup, class members will not receive the full preventive care to which they are entitled. In short, "[p]rofessionals cannot provide full services that class members need absent understanding of how EPSDT is supposed to function." *Fairness Order* at 31.

Plaintiffs presented evidence suggesting that defendants have failed to assure that the MCOs deliver appropriate training to all healthcare providers serving class members.[116]

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116. Pamtiffs rely primarily on the testimony of Ms. Tillman, who testified about efforts to train healthcare providers and their staff when she was the vice president and chief operating officer for Community First, a managed care contractors in the Bexar region. She described her inability to educate properly healthcare providers and their staff about their contractual responsibilities toward class members, reporting that managed care providers and their staffs are often more concerned with billing than with the entitlements of class members under EPSDT. TR 112, line 20 to 113, line 10. She also testified that her time spent educating busy physicians had been very limited and focused on profit-oriented concerns. TR 113, lines 12 21. While Ms. Tillman's descriptions of the motives and pre-occupations of physicians and their staffs may be accurate, they do not inform the court as to whether the training provided by defendants is appropriate under the decree.

Appendix D

A survey of providers conducted by the Texas Health Quality Alliance indicates that roughly half of the respondents were dissatisfied with "training for providers and office staff." P.Ex. MC-11 at 5. However, defendants have noted that provider surveys do not provide the most accurate data by which to gauge the "appropriateness" of training, as many providers may be dissatisfied with managed care generally. Defendants also note correctly that it is unclear from the survey which aspect of provider training produced the high level of dissatisfaction, because training on EPSDT is not evaluated separately by the survey respondents. Finally, defendants point out that provider satisfaction with managed care generally increases as providers continue to participate in the program. Therefore, the court finds that, on balance, this evidence is only marginally helpful in evaluating the appropriateness of defendants' training programs.

The 1999 THQA "MCO On-Site Review" reveals more about the adequacy of defendants' training programs. D.Ex. D-64. It shows, for example, that "[t]hree MCOs have not offered formal training to their physical health specialists." D.Ex. D-64 at 6. The report also indicates that "[p]rovider training beyond the initial orientation is limited unless requested by the provider or their office staff." D.Ex. D-64 at 6. Other evidence has shown that HMO staff themselves are not properly advised about the scope of healthcare services that they must provide to class members. P.Ex. MC-14 at 50, 57; TR 601, lines 8-10. The MCO On-Site Review confirms this impression, reporting that when THQA called the HMOs' member services hotlines, plan representatives from each managed care organization provided inaccurate information. Topics most often misrepresented were home modification,

Appendix D

self-referral for behavioral health services, comprehensive care, and medical transportation. D.Ex. D-64 at 13. The evidence also revealed that some HMO staff apparently do not answer callers' questions, but instead refer callers to their PCP handbooks. P.Ex. MC-12 at 35, 45.

Also relevant in determining whether training is "appropriate" is the evidence proffered at the hearing of the different kinds of training and education currently implemented by the MCOs, which are under explicit contractual obligations to train their providers about EPSDT. D.Ex. D56 at 44.[117] That evidence suggests that defendants and the MCOs offer an array of training services and pursue education through many avenues of contact with providers. D.Ex. D-41; Defendants' Response to Plaintiffs' Second Amended Motion to Enforce Consent Decree at 34-36.

"Appropriate," like "effective," is a term difficult to define. The court therefore looks to other relevant provisions in the decree for interpretive guidance. Notably, paragaph 104

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117. Section 6.8.3 of the "1999 Contract for Services" between defendants and the MCOs provides that each MCO "must provide appropriate training to all network providers and provider staff in the providers' area of practice regarding the scope of benefits available and the THSteps program. Training must include THSteps benefits, the periodicity schedule for THSteps checkups and immunizations, and Comprehensive Care Program (CCP) services available under the THSteps program to Members under age 21 years. Providers must also be educated and trained regarding the requirements imposed upon the department and contracting HMOs under the Consent Decree entered in [the instant case]. Providers should be educated and trained to treat each THSteps visit as an opportunity for a comprehensive Assessment of the Member."

expresses the parties' agreed-upon goal in provider education: "To adequately serve recipients, providers must understand how EPSDT works. They must also understand EPSDT recipients' needs." ¶ 104. This paragraph's emphasis on the providers' actual understanding, and its lack of focus on the programs offered, leads the court to adopt plaintiffs' interpretation of "appropriate." The evidence that MCOs do not understand which services class members may receive and how, and the evidence that providers' staff relay inaccurate information, strongly suggest that defendants have failed to assure that providers receive appropriate training. The court relies on this evidence in conjunction with the 1999 THQA MCO On-Site Review to arrive at the conclusion that, despite evidence of defendants' having made some efforts to provide education, defendants have not "assured" the provision of "appropriate" training. Therefore, it is found that plaintiffs have established by a preponderance of the evidence that defendants are in violation of paragraph 194.

F. Data Collection in the Managed Care System: Findings of Fact Regarding Violations of Decree

As the United States General Accounting Office has stated,

> [t]he continuing trend toward expansion of mandatory, capitated Medicaid managed care programs requires that states have the ability to adequately oversee their contracts with health plans and ensure that states get what they are paying for. However, developing systems to hold plans accountable for ensuring that Medicaid beneficiaries receive the care that they need has been a challenge for states. . . . [T]o . . . [assure] that managed care can effectively and efficiently meet the healthcare needs of Medicaid beneficiaries, more effort is needed.

P.Ex. MC-18 at 24.[118] As noted in Section III(A), the parties, recognizing the potential problems in data collection in a managed care system, included paragraph 191:

> 191. TDH will assure by various means that the number and percent of EPSDT patients in each managed care organization who receive all medical and dental checkups when due and information for outcomes research as needed is accurately collected.

The evidence has shown that defendants have violated paragraph 191 in several ways. First, defendants' federal reports to HCFA about checkups are not accurate or complete. Defendants appear to concede that their reports to HCFA in 1997 and 1998 were incomplete because of their lack of data on class members enrolled in managed care.[119] P.Ex. —32, M-39.

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118. Similarly, the Health Care Finance Administration has characterized the collection of EPSDT data as "problematic," noting in particular problems in the "reporting of services provided in capitated settings." P.Ex. MC-21 at 6.

119. Defendants provided a revised report for 1998 as Exhibit D-115, *see also* D.Ex. D-96, D-97. During the hearing, defendants provided a second revised report, which reduced the participation rate to reflect further revision of the managed care checkup data. Specifically, in the second revision, defendants revised their (Cont'd)

Appendix D

Studies conducted by the Texas Quality Health Alliance (THQA) corroborate the conclusion that defendants' managed care reports about checkups are seriously flawed. One of the primary tasks of the THQA is to evaluate managed care "encounter" data to determine its validity. TR 561, lines 4-22. Encounter data is similar to what is called "claims data" in the fee-for-service healthcare environment. In fee-for-service, "claims data" includes information about claims that health-care providers submit for payment for services rendered to patients. Because managed care frequently does not pay healthcare providers on a per-service basis, claims data is not available. Instead, managed care organizations record "encounters." TR 561, lines 13-22.

In general, THQA has been unable to validate data provided by defendants' managed care contractors, as is revealed by the most recent THQA study of managed care encounter data. P.Ex. MC-6 ("Validation Study, 2000"). The Validation Study found significant inaccuracies in the managed care data. THQA was unable to verify the MCOs' reports of the number of Texas Health Steps medical checkups conducted on managed care enrollees. P.Ex. MC-6 at 37; TR 620, lines 4-11. In other words, THQA could not confirm that the MCOs had correctly calculated the number of check-ups provided to class members. P.Ex. MC-6 at 37. In the words of THQA's research director, the MCOs' utilization management data "need[s] to be interpreted with considerable

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participation rate for class members of all ages downward from .72 to .66. TR 465, line 9 to 466, line 11. While the court appreciates defendants' recent efforts to provide correct data, their last-minute revisions to the report do not inspire confidence in the accuracy of the managed care data.

Appendix D

caution. . . . Overall, I would be cautious in using it." TR 620, lines 12 - 25 (Testimony of Dr. Jemelka).

There also seems to be a considerable lack of accord between the managed care administrative data sets and class members' medical records. TR 632, lines 9-11. Moreover, THQA never checked to see if the 1998 managed care administrative databases over-represented checkup encounters found in medical records. This shortcoming in the study is of great consequence because the assumption in the medical community that if an event is not recorded in a patient's medical record, it did not happen. TR 630, lines 3-19. Furthermore, in a 1997 study, THQA found that about one-quarter of the data reported in the MCOs' administrative databases was not reflected in any medical records. TR 622, lines 11-16. This suggests that the MCOs' administrative data reports checkups that have not occurred, or that have not been documented.

Finally, defendants fail to ensure that accurate outcome measures[120] data is collected on class members in managed care. Timmy Blanton, M.P.A., "principal staff person"[121] for the outcome measures research required by the decree explained that such outcome measures would help to assess whether Texas Health Steps clients' care is improving, and would be instrumental in correcting problems with the system and improving class members' care. TR 513, lines 13-21.

120. Defendants' obligations under the outcome measurement provisions of the decree are discussed in more detail below, in Section VII.

121. TR 501, lines 13-15.

However, defendants have not obtained all of the data that they need in order to include managed care enrollees in outreach studies required by the decree. For example, although defendants have agreed to study class members' length of hospitalization for asthma, they "will not be able to provide [data for] managed care" enrollees regarding this factor. TR 519, lines 13-20. At the time of the hearing, defendants had established managed care programs in all major urban areas in Texas. P.Ex. MC-57. By excluding class members in managed care, Defendants exclude a very large and important group of class members from their database.

To conclude, defendants do not accurately report the number and percentage of class members in each managed care organization who receive medical checkups when due. Their data is neither complete nor accurate,[122] and they are therefore in violation of paragraph 191.

V. Issue Five: Toll-Free Numbers

A. Overview

To help class members acquire knowledge about Texas Health Steps, locate providers, set appointments, and arrange transportation to and from appointments, defendants maintain a statewide toll-free telephone number and two toll-free telephone numbers in each geographical region. The purpose

122. A similar conclusion has been reached in the legislative arena. The Texas Legislature's Sunset Advisory Commission's 1998 staff report concluded that "[t]o date, the State has been unable to obtain much useful information from existing Medicaid managed care data." P.Ex. M-3 at 91.

of the statewide hotline is to respond to questions about Medicaid.[123] The Regional Texas Health Steps toll-free

123. Defendants argue that this statewide toll-free number is not covered by the decree. They argue, first, that paragraphs 239-245 describe the purposes of toll-free numbers, which are to help class members schedule appointments and to arrange transportation. Defendants urge that the statewide toll-free hotline does not serve these functions, so it is not covered by the decree. D.Ex. D-92. Second, defendants assert that there are few Texas Health Steps-related calls to the statewide toll-free number. A "Texas Health Steps-related . . . [call is when] . . . a client called and asked a question about Texas Health Steps." TR 958, lines 20-23. In 1999, the total number of Texas Health Steps-related calls to the statewide toll-free number was 7,677, or 3.25% of total calls received. D-91. However, it is noted that defendants' definition of "Texas Health Steps-related calls" is so limited that it overlooks many calls about or from class members, particularly given the broad scope of their entitlement-to services from defendants. 42 U.S.C. § 1396d(r)(5).

Plaintiffs urge that the statewide toll-free number is covered by the decree. First, the heading to paragraph 247 refers to "Standards for Toll-free Help Lines (Transportation, Scheduling Assistance *and Other*) (emphasis added). The heading alludes to more than just scheduling and transportation assistance, and by its own terms purports to cover more than just the lines that deal directly with scheduling and transportation assistance. The court is in agreement with plaintiffs that the plain language of paragraph 247, which sets out standards for "Toll-free Help Lines (Transportation, Scheduling Assistance and Other)," covers the statewide Medicaid hotline. Although it is noted that class members are not the only group of people who use the hotline, nor the largest, the hotline must be considered a "toll-free number[] for EPSDT recipients" within the meaning of paragraph 247 because it is set up to answer the questions of all Medicaid recipients, whether they are EPSDT clients or other Medicaid recipients.

numbers were instituted to answer questions about EPSDT and to help class members find healthcare providers to serve them. Regional Medical Transportation Program toll-free numbers help class members arrange for transportation to appointments.[124]

Before this court's entry of the decree, class members "had serious trouble even getting through to [defendants'] staff by phone to ask for help." *Fairness Order* at 15. After long waits at pay phones, class members with no phones at home were asked to leave home phone numbers for return calls. *Id.* Also, "[g]etting transportation assistance from toll-free telephone numbers often required long waits." *Id.* at 16.

Many class members do not have phones.[125] The lack of a phone makes it difficult, if not impossible, for class members

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124. One of the most common reasons that Texas Medicaid recipients miss healthcare appointments is that they have no form of transportation. P.Ex. T-43, "1999 Report on the Medical Transportation Program: A Survey of THSteps Recipients and Providers," at 37.

125. According to Ms. McHan many class members' families do not "have a phone or . . . have a phone part of the time but then have it disconnected [or] have difficulties maintaining a phone on a regular basis." TR 24, lines 2-8. Ms. Singleton also testified that class members and their families have trouble maintaining telephones. "[T]he phones go on and off almost like lights." TR 167, line 22; TR 244, lines 16-20. In addition to lacking a phone at home, many class members' parents lack access to phones while they are at work. They are only allowed to use the phone for emergencies or during short breaks during their shifts. TR 24, lines 9-24.

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and their families to make repeated calls to defendants' toll-free numbers, or to wait for defendants to answer their phones. TR 30, lines 8-20; *see also* P.Ex. A-2 at 12. According to Terry Hicks, the Director of Medical Transportation for East Texas Support Services in Jasper, Newton County, the problems with phone-call coordination deprive class members of services.[126]

> If Medicaid recipients call and call and can't get through to the Medical Transportation system, eventually they give up and stop trying. If they can't find another way to get to their healthcare appointment, they miss the appointment. Some ETSS clients have missed appointments because they couldn't get transportation help through the Texas Dept of Health's Medical Transportation Program toll-free numbers.

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The Federal Communications Commission's "Telephone Penetration by Income by State" (January 1998) confirms this testimony. In Texas and throughout the United States, poverty is associated with having no phone at home. P.Ex. T-4 at 5. For example, although more than 90% of all Texas households had telephones in March 1997, less than 80% of Texas households with incomes under $10,000 had phones. P.Ex. T-4 at 5.

126. GMs. Hicks bases her statement on many years of experience working with class members who need transportation assistance to be able to use Medicaid services. P.Ex. A-3 at 3. For thirteen years, she has been responsible for arranging all rides provided by ETSS for Medicaid recipients who live in fourteen East Texas counties. P.Ex. A-3 at 4. ETSS provides about 2,500 rides per month; about 45% of the rides are for class members. P.Ex. A-3 at 5.

P.Ex. A-3 at 7. As a result, many EPSDT recipients have not received the Medicaid services they need. P.Ex. A-3 at 10.[127] Many class members report that they have not used defendants' transportation program because they were unable to gain access to the program by phone. P.Ex. T-43 at 42-43, Table 7.1. Seventeen percent of class members report that they could not use Defendants' Medical Transportation Program assistance because the toll-free number was busy. TR 976, lines 21-24. Callers also complain of having missed scheduled healthcare appointments because they cannot get through to defendants' toll-free numbers. TR 974, lines 8-12.[128]

In response to these problems, the parties agreed to the following decree provision:

> 247. *Standards for Toll-free Help Lines (Transportation, Scheduling Assistance and Other)* Toll-free numbers for EPSDT recipients will be staffed sufficiently by well trained personnel. Each recipient will receive prompt service by a person who is knowledgeable, helpful and polite. All calls will be answered promptly absent equipment failure. Equipment will be adequate so failure results only from circumstances beyond Defendants' control, such as bad weather. TDH will make reasonable arrangements to meet the needs of mcipients who do not speak English. No calls may be "answered" by a tape recording during working hours except in unusual circumstances.

127. Defendants' witness Mr. Millwee agrees that if callers cannot get through to defendants' toll-free numbers, they face barriers obtaining transportation assistance. TR 973, line 25 to 974, line 12.

128. For example, M.G:G. complained that she was unable to reach Defendants' South Texas Medical Transportation Program, and consequently her "very ill" son missed his appointment. Similarly, Y.D. complained that her son missed his appointment with his doctor because of the lack of transportation. Ms. D. waited a long time while the line was busy, and when she finally did get through, the system disconnected her. P. Ex. T-40.

Plaintiffs complain that class members' calls are not answered "promptly," and that class members often are not serviced by a "person who is knowledgeable, helpful and polite."

B. Findings of Fact: Prompt Answering of All Calls

Abundant evidence suggests that defendants have been less than prompt in answering class members' calls. Data for the period of September through November of 1999 indicates that the average waits in queue on the Texas Health Steps Toll-free Lines for Regions 4/5 and 9/10 ranged from 94 to 121 seconds, and 142 to 161 seconds, respectively. P.Ex. T-22. The average waits in queue on the Medical Transportation Program Toll-free Line during those months ranged from 124 to 190 seconds in Region 6, and from 46 to 56 seconds in Region 7. D.Ex. D-109. And on the Statewide Toll-free Line, the average wait ranged from 163 to 229 seconds on the English line, and from 96 to 237 seconds on the Spanish line. P.Ex. T-17, T-18.

However, these averages mask the extremely long delays sometimes faced by class members. For example, in December of 1999, the Region 2 (Abilene) Medical Transportation Program toll-free number had an average

speed in answering of 30 seconds. However, the longest wait before a call was answered was 13 minutes and 2 seconds. P.Ex. T-25; *see also* TR 961, line 25 to 963, line 20. Similarly, in December of 1999, the Tyler Medical Transportation Program had an average speed in answering of just 11 seconds. Even so, the longest wait before a call was answered was 9 minutes and 46 seconds. P.Ex. T-26.

Likewise, in November of 1999, the average wait in queue for the South Texas Medical Transportation Program was 16 seconds, D. Ex. D-109, while the longest wait in queue in the Corpus Christi call center was 12 minutes and 13 seconds. P.Ex. T-29. In 1999, the longest wait for calls to be answered by the South Texas number was 17 minutes and 18 seconds. P.Ex. T-29; *see also* TR 964, lines 5-21; *see also* TR 967, line 16 to 969, line 10. 540. In Region 6, as recently as the week of November 8, 1999, the maximum delay before a call was answered was 23 minutes and 20 seconds. During the week of August 23, 1999, the longest delay was nearly 29 minutes.

As for the statewide Medicaid hotline, the English-language line had maximum waits of over 22 minutes in each month of 1999, and the longest maximum wait for a call to be answered was 49 minutes and 16 seconds. P.Ex. T-16; *see also* TR 970, lines 2-5. For the Spanish-language statewide line, the longest maximum wait was 59 minutes and 20 seconds, in June of 1999. P.Ex. T-16; *see also* TR 970, lines 8-13.

High call "abandonment rates" — percentages of callers who hang up, presumably in frustration — provide additional evidence that calls are not being answered promptly.[129] For the Texas Health Steps Toll-free Lines, the abandonment rate ranged from 12 to 20% from September through November of 1999 in Region 5. P.Ex. T-22. For the Medical Transportation Program Toll-free Line, three regions had abandonment rates of over 10 percent from June through August of 1999. (Region 6, the worst of the lot, had a rate that ranged, approximately, from 20 to 28 percent.) D.Ex. D-109. For the Statewide Toll-free Line, the abandonment rate for February of 1998 to February of 1999 ranged from 17 to 48%. P.Ex. T-16.[130]

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129. Defendants appear to argue that abandonment rate evidence is irrelevant, as the decree is silent regarding the abandonment of calls. Defendants' Response to Plaintiffs' Second Amended Motion to Enforce the Consent Decree, at 38. However, it is found that these rates are one of several indicators of the promptness with which calls are answered by defendants and are therefore relevant to the issue of whether defendants are in compliance with paragraph 247.

130. The average and maximum delays before callers abandon their efforts to reach defendants' Medical Transportation Program toll-free numbers are also relevant to this discussion. In Region 6, the average delay before abandonment can be quite long. For example, during the week of Sptember 6, 1999, the average delay before abandonment was more than 5 minutes. P.Ex. T-28. From May 31 to December 13, 1999, the shortest weekly average delay before abandonment in Region 6 was 63 seconds during the week of December 13. During that same week, the maximum delay before abandonment was almost 15 minutes. P.Ex. T-28.

Appendix D

Evidence that calls are not answered promptly is not limited to statistics. Several mothers and grandmothers of class members from different parts of the state testified about these delays. One mother of three seriously ill children testified that she called defendants' statewide Medicaid hotline several times and was put on hold for 15 to 30 minutes.[131] She testified further that she had been on occasion "placed on hold for more than an hour. . . Only twice or perhaps three times was I ever able to talk with a live person, even after a long wait." P-Ex. A-1 at 4-5.

Another mother noted:

> Most of the time it's really hard to get the Houston Medical Transportation office on the phone. Their phone is busy, busy, busy. . . . Sometimes I finally get through and sometimes I don't. When I don't get a busy signal, sometimes the phone rings 20 times or even more before anybody answers. Then, I get put on hold. . . . [J]ust last month . . . [s]omeone answered pretty quickly, but they just said 'hold' and then put me on hold again. They didn't even let me say anything. After that it was about 15 minutes before they got back on the line.

P-Ex. A-5 at 9.[132]

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131. C.H. is a Tarrant County mother of three young class members, Jonathan, James and Jacob, each of whom has ongoing, serious health problems. *See* P.Ex. A-1 at 3-4.

132. B.M. is the mother of class member Samantha, who suffers from various chronic health problems. *See* P.Ex. A-5 at 5. B.M. herself is disabled. P.Ex. A-5 at 4. She cannot drive because her sight and

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Appendix D

Class members were not the only people who testified about calls not answered promptly. Ms. McHan testified that her staff often must help class members make arrangements with defendants' Medical Transportation Program when family members have difficulty contacting the program. TR 28, lines 6-12. Numerous incidents, as recent as December of 1999, reported by defendants' own toll-free number staff reveal many problems and delays inconsistent with any commonsense notion of "promptness."[133]

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brain were damaged in an accident. P.Ex. A-5 at 8. Her testimony concerned defendants' Medical Transportation Program toll-free number in Houston.

133. Some of the incidents are recounted, below:

- In Region 1, callers hear a message to "choose 1 or 2. When you choose either one of these options, the computer voice comes on saying 'the person at extension 780 is on the phone, please leave a message at the tone or press 0 for assistance. . . . If you press 0, it loops back to the computer voice. . . " December 3, 1999 memo from Susie Arellano, TDH Region 1. P.Ex. T-40.

- Region 4 "[c]lients say our number rings and goes dead. I tested it and it rang several times and went dead. I tried again and got our second recording. Something is not right." December 14, 1999 memo from Jess Reeves, TDH Region 4. The problems were still not fixed two weeks later. *See* December 15, 1999, December 16, 1999 and December 28, 1999 memos from Jess Reeves, TDH Region 4. P-Ex. T-40.

- In Region 10, "we've had a lot of calls from clients saying that they are calling our office and no one is answering the phone.

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C. Violations of Decree: Prompt Answering of All Calls

Defendants respond with three arguments. First, they claim that the phrases "prompt service" and "answered promptly" are too vague to create binding obligations. Second, defendants assert that the court should adopt a five-minute standard for promptness in interpreting the decree, and that they have met that standard. Third, defendants argue that the statewide average of the regional average waits in queue and abandonment rates, not the regional figures themselves, should form the basis of this court's judgment regarding their compliance with the decree.

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The phone reports are showing an elevated increase in abandoned calls, actually, we've never experienced them to be this high since the problem we had last time where equipment needed to be replaced." December 9, 1999 memo from M. L. Duran, TDH, Region 10.

- "[W]e continue to receive calls from upset clients saying we are not answering the phones. A contractor called and said she tried for 15 minutes calling the 1-800 # and the line was repeatedly busy. I tried it and verified that it rings busy." December 13, 1999 memo from Mary Lou Duran, P.Ex. T-40.

- In Region 11, "[j]ust tried from my phone, I reached the recorded message, then it is ringing and ringing." December 28, 1999 memo from R.M. Garza, TDH Region 11. P.Ex. T-40.

- In late December of 1999, "Javier noticed an unusual amount of abandoned phone calls. Today, workers are receiving calls, answering them and there is no one on the line, phone simply hangs up." December 28, 1999 memo from Gloria Macias, TDH. P.Ex. T-40.

The first of these arguments is rejected. Defendants promised plaintiffs that they would provide "prompt service" and answer calls "promptly" — a promise that may be enforced within the meaning of these phrases as interpreted within the "four corners" of the decree. The court agrees with defendants that these terms are ambiguous, but that does not end the inquiry. A finding that language in a consent decree is ambiguous merely permits the court to consider extrinsic evidence of the parties' intent in drafting the language. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). Our task is to understand more fully what the parties meant by the use of the word "prompt."

Abandonment Rates

Plaintiffs urge the court to consider evidence of an alleged industry-wide standard for the prompt answering of calls, based on average waits in queue and abandonment rates targeted by various corporations in their operation of toll-free telephone lines. However, evidence of performance by corporations such as General Electric, Land's End, and American Express is simply too far removed from the state's operation of toll-free numbers for the benefit of its Medicaid population to be considered relevant to the parties' understanding of the word "prompt." These pie-in-the-sky targets, characterized within a Kaiser Associates report prepared for defendants as the "rapid, timely" responses of "best-in-class companies" reveal little about the parties' intent when they agreed to the "prompt" answering of calls. P.Ex. T-11. Nor does the isolated

performance of Community First, one of defendants' managed care contractors in the Bexar region, paint a clear picture of any industry-wide standard. P.Ex. T-14.[134]

However, several documents in evidence have proved useful in arriving at a working definition of "prompt." First, a final draft of the "Medicaid Managed Care Enrollment Standards and Guidelines," issued by the U.S. Department of Health and Human Services Healthcare Financing Administration (HCFA) includes a section entitled "Abandoned Calls/Call Waiting Times." P.Ex. T-10. In that section, HCFA lists a set of "generally acceptable standards" which "states should require" those who conduct enrollment and information service functions in Medicaid managed care to meet. Among the enumerated standards are an average queue wait time of less than 45 seconds, and an abandonment rate of five to ten percent. *Id.* Although these standards were promulgated after the signing of the decree, and are non-binding, the frequent citations to and recitations of the federal ESPDT statute throughout the decree suggest that the parties

134. Plaintiffs also draw the court's attention to the performance standards of Maximus, with whom defendants have recently contracted to conduct Texas Health Steps outreach in 195 Texas counties. TR 857, lines 1-13; D.Ex. D-108. As part of their Texas Health Steps outreach efforts, Maximus takes calls from the same callers (class members and their families) who also call the defendants' toll-free numbers, TR 971, lines 12-8, but Maximus maintains a much better average speed to answer of 20 seconds. TR 863, lines 4-5. This performance rate, which should provide hope for the future of defendants' outreach program, is best categorized as another example of top performance to which plaintiffs may not hold defendants without having included clear standards in the decree.

intended to draft a document that would be rooted in the requirements of federal law. It is reasonable to surmise that in agreeing to the word "prompt," the parties were agreeing to a term that could only derive its meaning from some outside source, or some unmentioned standard of performance. Because the decree draws so heavily on federal law, it is reasonable to examine federal guidelines in construing those provisions the court finds ambiguous.

The court is mindful of the Supreme Court's mandate in *Armour* to interpret decrees without reference to the purposes of federal law. *See* Section I(C). It is the incorporation of the language of the federal EPSDT statute throughout the decree by the parties themselves, however, that suggests that the ambiguity raised by "prompt" may in part be resolved by consulting the standards of the federal agency charged with the administration of EPSDT. By expressly incorporating the language of federal law throughout the decree, the parties created the backdrop against which an ambiguous phrase like "promptly answered" must be considered.

Nevertheless, because of the above-noted risks of interpretation, other extrinsic evidence will be considered to determine the meaning of "prompt," in accordance with the Supreme Court's decision in *ITT Continental Baking Co.* An excerpt from defendants' contract with its MCOs proves helpful in this task. P.Ex. —34. One purpose of the contract is to ensure that defendants, by requiring various activities by the MCOs, comply with the mandates of the consent decree. *See* Section IV(C), ¶¶ 190, 192. Section 8.5 of the contract requires the contracting MCO to maintain a toll-free hotline, and to demonstrate "telephone availability" through

an "abandonment rate of less than 10%." P.Ex. M-34 at 84. Obviously, the defendants' having required the MCOs to maintain an abandonment rate of less than ten percent does not lead directly to the conclusion that the defendants bound themselves to a similar standard in their contact with plaintiffs. However, the fact that many provisions of the MCO contract seek to ensure defendants' compliance with the decree suggests that the rate may be one component of MCO performance that defendants thought necessary to the adequate servicing of the plaintiff class. While the decree does not specifically state that defendants must assure the "prompt" answering of calls by MCOs, it is logical to conclude that defendants regarded the maintenance of a ten percent or lower abandonment rate as necessary for the facilitation of plaintiffs' "timely receipt" of services from MCOs. ¶ 190. Therefore, even if paragraph 247 were read to require only minimally adequate "promptness," defendants' MCO contract, which sets out standards that MCOs must meet for defendants to meet other decree provisions, suggests that an abandonment rate of ten percent or lower is required by paragraph 247.

Even if a different standard of promptness governs the behavior of MCOs than the standard to which this court may hold defendants under paragraph 247, defendants' internal documents lend further support to a ten percent rule. Plaintiffs' Exhibit T-13 includes an excerpt from a document entitled "Monitoring and Coaching for Peak Performance," which was studied by defendants' toll-free number staff at a training session provided by Jane Finn and the Quality Alert Institute. The document coaches defendants' employees operating toll-free lines to aim for the "Industry Standard" of five

percent or lower abandonment rate. P. Ex. T-13 at 12; TR 971, line 23 — 972, line 8. This document — again, because of the defendants' likely aim of compliance with the decree — is suggestive of how defendants interpret the word "prompt." The document is therefore instructive on what the defendants intended when they agreed to answer calls "promptly."

Perhaps most important, defendants have set their own standards for their Regional Texas Health Steps and MTP lines: on average, they must answer calls within 90 seconds and they must abandon no more than ten percent of calls. TR 891, lines 4-6 (Testimony of Billy Millwee). It is acknowledged that defendants' behavior after the signing of the decree does not necessarily reveal their understanding of the requirements of paragraph 247.[135] However, the congruence of each of the pieces of evidence discussed above, and the persistent appearance of the five to ten percent abandonment rate in particular, leads this court to conclude that paragraph 247 requires a degree of promptness associated with an abandonment rate approximating ten percent.

Queue Waits

Had defendants produced evidence of short average waits in queue, the abandonment rate would have less weight as a indicator of actual promptness. But the evidence presented

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135. Nonetheless, defendants note in their post-hearing brief that "[t]he toll-free telephone standards embraced by the Department of Health when the Consent Decree was entered in 1996 were no more than ten percent call abandoned . . . " Defendants' Post-Trial Brief at 47.

suggests that the average waits in queue are sometimes quite lengthy. *See* Section V(B). Defendants' goal is for their Texas Health Steps and Medical Transportation Program toll-free numbers to answer calls on average within ninety seconds. TR 892, lines 14-8. (Testimony of Mr. Millwee). Not all regions meet this standard. *See* Section V(B). Defendants urge the court to accept a "five-minute-standard" for queue waits as characteristic of "prompt answering" as defined by the decree. However, defendants' reliance on other toll-free number services is rather unhelpful. D.Ex. D-93, D.Ex. D-112; Plaintiffs Proposed Findings of Fact and Conclusions of Law. No order of the court requires that these toll-free numbers be answered promptly. Moreover, several of these toll-free number services are run by defendants or their contractors. D.Ex. D-93. It would be letting the fox watch the chicken coop to allow defendants to use their own performance (or that of their contractors) to help define the standard of promptness required by the decree.

For these reasons, it is found that not enough evidence has been provided for the court to determine what average wait in queue may be deemed "prompt" under paragraph 247. However, evidence about lengthy delays experienced by individual class members is useful here. *See* Section V(B). This evidence aptly demonstrates that class members' waits in queue do not comport with a common understanding of what it means to have one's call answered "promptly."

Unit of Measurement

Defendants' primary attempt to rebut plaintiffs' evidence of noncompliance in this area involves a dispute about the proper unit of measurement. Specifically, they object to the selectively pulling of data from specific regions or clusters of counties in which defendants' record is particularly abysmal. Defendants assert that the statewide average wait in queue and statewide abandonment rate are more reliable indicators of promptness. Defendants' Response to Plaintiffs' Second Amended Motion to Enforce Consent Decree, at 38-39. They argue that, on average, regional average waits in queue are not excessive. D.Ex. D-84, D-85, D-89, D-90. Specifically, defendants note that, as of the first quarter of fiscal year 2000, the average wait in queue for the regional Texas Health Steps lines was 43 seconds; for the Medical Transportation Program it was 47 seconds. Defendants also note that statewide average abandonment rates for the Texas Health Steps toll-free lines ranged from 4.6% to 5.7%, and that statewide average abandonment rates for the transportation program line ranged from 9% to 11%. However, one witness admitted that charts about statewide performance do not reveal whether defendants answer "all calls" promptly. TR 961, lines 4-24 (Testimony of Mr. Millwee).

The phrases "each recipient" and "all calls" in paragraph 247 suggest that the paragraph should be read to require promptness for all class members, in all regions of the state. It is true that averages must be used to gauge the "promptness" which defendants afford class members. However, given the paragraph's inclusive language; and its emphasis

on the experience of individual class members, it is concluded that class members, no matter where they live, are entitled to prompt service. The regional averages are thus a superior measure of defendants' success in ensuring promptness than are statewide averages, which mask defendants' failures in some regions to ensure promptness. The court's decision to rely on regional data is also compelled by the parties' emphasis on "statewideness" throughout the decree. ¶¶ 271-281. It is therefore found that defendants were out of compliance with paragraph 247 during the periods of time in which calls were not answered promptly in certain regions of the state.[136]

D. Knowledgeable, Helpful, and Polite: Findings of Fact Regarding Violations of Decree

The decree also entitles class members to "prompt service by a person who is knowledgeable, helpful and polite." ¶ 247. However, the evidence presented at the hearing demonstrated that defendants' staff members are often unhelpful or lack knowledge.[137]

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136. Defendants point to recent efforts made to improve their toll-free line services, including the transition of several regional lines to a contractor, Maximus, Inc., which has resulted in dramatic improvements. Defendants' Response to Plaintiffs' Second Amended Motion to Enforce the Consent Decree, at 39. These efforts are applauded and the results striking. This record will inform the court in its formulation of orders of enforcement.

137. Also, sometimes toll-free number staff are unable to assist class members because the caller speaks only Spanish and the staff do not speak Spanish, even in the South Texas office. *See, e.g.*, complaints from M.R. from McAllen, M.O. from Donna, F.N. from Austin. P.Ex. T-40.

The mother of one class member testified that "[o]n the two or three occasions that I was able to talk with a live person, the person was not polite or helpful. They told me that they could not answer my questions and that I needed to call somewhere else." P.Ex. A-1 at 5.

Another mother of a class member said that one "problem with the Houston Medical Transportation Program office is that sometimes the person who answers the phone doesn't know what they should do." P.Ex. A-5 at 9. Although she herself is disabled by cerebral palsy, the Medical Transportation Program office staff member told her that she and her daughter "had to take the bus to [the class member's] medical appointments. . . . [the staff member] just kept saying that if we couldn't take the bus they couldn't help us." P.Ex. A-5 at 5-9. The staff person was unaware of other transportation options, such as cabs or Metrolift.[138] Although she promised to research the issue and call back, she never did. P.Ex. A-5 at 9. The problem remained unresolved until counsel intervened.

A third parent stated that the Medical Transportation Program staff need to be better trained. P.Ex. A-7 at 7. Even though her son had had the same schedule for his rehabilitation appointments for months at a time, the Transportation Program staff still made scheduling errors despite repeated calls. P.Ex. A-7 at 7. She also described how diffcult it was to arrange her son's transportation to rehabilitation after her truck broke down. She requested that a van be sent to pick

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138. Decree paragraphs 214-16 describes the scope of defendants' transportation services. *See also* ¶¶ 231-2, Order (filed May 19, 1997).

him up at school and take him to rehabilitation. The staff person at the Transportation office told her that it was impossible because her son was a minor. The problem was rectified only weeks later, after the mother discussed the matter with a supervisor at MIR P.Ex. A-7 at 8. Moreover, in order to receive mileage reimbursement to which she was entitled, she found it necessary to consult with counsel. P.Ex. A-7 at 8.

Finally, Ms. McHan testified that "some of the staff need to be a little better trained in sensitivity toward the clients they are working with." Both she and her clients, who are parents of class members, have experienced the staff members' rudeness over the phone. TR 39, fines 11-6, *see also* P.Bx. A-2 at 19. She also noted that Medical Transportation Program toll-free number staff are sometimes less than helpful because they lose information that has previously been supplied. Ms. McHan stated that workers sometimes deny that the information has been given to them on prior occasions. TR 40, lines 5-12.[139]

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139. She also explained how staff members' rudeness and unhelpfulness can be a barrier to receipt of services that class members need. It can be

> devastating. . . . Your child is already sick. . . . You need to go out of town, spend the night [to address your child's health problems]. How are you going to make arrangements for your other children. You are already stressed out, and then there is somebody who has no empathy for you on the phone. Families feel really badly about that sort of thing. . . . I've had parents say to me,

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Based on the evidence presented above, the court finds by a preponderance of the evidence that defendants have violated paragraph 247. Plaintiffs have succeeded in demonstrating that class members' calls are frequently not answered by knowledgeable and helpful staff members.

VI. Issue Six: Case Management

A. Role and Importance of Case Management

"Case management" refers to the service provided by "case managers," or employees of the state who help families to navigate the often confusing healthcare system. Case management helps indigent families to develop coherent plans to take care of their children's healthcare and related needs. Case managers also work to help empower families to request healthcare services on their own. Their support can often be crucial for class members and their families, who are largely uneducated and unfamiliar with the state's healthcare system in general, and with Texas Health Steps in particular. Thus,

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> "I don't want to feel like I'm a drain on the system or that I am scum because I have to ask for this help. . . . " And that does affect families quite deeply. . . . I have had family members cry in my office because of something somebody said to them.

TR 40, line 22 - 41, line 12. When class members feel frustrated or demeaned in the process of asking for help, she explained, they often fail to get healthcare that they need, because they decide not to call back, and not to attempt to gain access to the system in the future. TR 56, line 24 to 57, line 4.

case management plays a vital role in facilitating recipients' access to needed medical, social, and educational services.

Before this lawsuit was filed, defendants "only provided case management on a limited basis to several categories of class members." *Fairness Order* at 33. In response to the decree, defendants developed a new case management program called Texas Health Steps Medical Case Management ("case management"). The program is aimed at a broad group of class members who have a health condition or risk, have special healthcare needs, or whose physical conditions are medically complex or medically fragile. P.Ex. C-1 at 14. The purpose of providing case management to class members who are at risk of health problems is "preventive." TR 141, lines 6-18.[140]

Class members face numerous barriers in gaining access to healthcare, including language barriers, lack of transportation, unemployment, substandard housing, and lack of food, shelter, and clothing. TR 15, lines 5-15. The evidence demonstrated that Texas Health Steps medical case management is needed to overcome barriers to care. TR 380, line 15 to 381, line 6; TR 405, line 22 to 406, line 3 (Testimony of Margaret Bruch).[141] Case managers often find adequate food and shelter

140. The components of Texas Health Steps case management are intake, family needs assessment, service plan development, and follow-up. TR 366, lines 6-16, *see also* P.Ex. C-1 at § 33.503.

141. The court qualified Ms. Bruch, a program consultant for Texas Health Steps case management, as an expert in "medical case management in the Texas Health Steps program and other programs administered by the Department of Health." There was no objection. TR 356, lines 11-6.

for class members and their families. Without case management, it is extremely difficult for some class members to receive services that they need through defendants' managed care programs. TR 70, line 23 to 71, line 8 (Testimony of Ms. Tillman).[142] Children who are homeless or who live in shelters are also particularly difficult to serve without case managers. TR 71, lines 17-22. And in situations in which a child's health problem stems from the poor health of the child's parents, case managers play a vital role."[143] In each of these situations, case management provides a comprehensive approach that helps overcome families' multiple obstacles to safe and healthy living.[144]

142. Ms. Tillman is one of four owners of Community Outreach, Referral and Evaluation in San Antonio. She testified about the day-to-day provision of Texas Health Steps case management. TR 67, lines 2-3; P.Ex. W-11. Since its beginning in 1998, CORE has helped about 1,000 class members and their families. TR 69, lines 15-17.

143. For example, Ms. Tillman discusk, ed the plight of a class member who was not eating properly and therefore failing to thrive. Upon a referral from the doctor, CORE discovered that the class member's mother had an eating disorder. TR 72, lines 20-5. She also noted that parents with mental retardation or mental health problems sometimes "don't understand how the system works" and need to be educated by case managers. TR 73, lines 3-15. She spoke about parents who become "overwhelmed" by large numbers of children with serious health problems, and the need to assist them with transportation and other support. TR 74, lines 9-25.

144. For example, CORE helped a family where the father was a single parent raising five class members. The mother was in jail. CORE initially became involved when the 16-year-old class member's arm was injured in a drive-by shooting. He needed intensive physical

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B. Findings of Fact

Acknowledging the importance of medical case management to the families who need it, the parties included in the decree the following provisions:

> 248. EPSDT programs must provide case management to each recipient if needed. Since case management is a service that Medicaid programs may cover, 42 U.S.C. §§ 1396d(a)(19); 1396n(g), Medicaid programs must cover it for EPSDT recipients if medically necessary. 42 § U.S.C. § 1396d(r). . . .
>
> . . .
>
> 264. By January 31, 1996, the parties will complete a case management plan for the EPSDT program. Case management includes arrangements for the child and the family which are needed to meet the child's healthcare needs. The plan will make sufficient case management available in every

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therapy on his arm. TR 77, lines 2-3. In addition to helping with the physical therapy problems, CORE helped the father to get into a work program and helped the family to find other housing in a neighborhood without gang violence. CORE also addressed the other class members' health problems. Thus, even though the initial reason for helping the family was medical, CORE tackled each element that put the class members' health at risk. TR 77, lines 15-19, TR 76, line 20 to 78, line 6.

> county or cluster of counties where few recipients reside. It may provide case management by contract with local agencies or on a fee-for-service basis, whichever is more effective in each county.

The Need

At issue is whether defendants have enacted a plan that makes "sufficient case management available in every county or cluster of counties where few recipients reside," as required by paragraph 264. As a threshold matter, the parties dispute how many class members are in need of the service. Defendants estimate that about 7% of the class (about 90,000 to 107,000) are in need of medical case management. Plaintiffs contend that more than 10% of the class need case management. Plaintiffs' Second Amended Motion to Enforce the Consent Decree, at 37.

Defendants base their 7% estimate on data from the defendants' High Risk Pregnant Women and Infants case management program ("PWI case management"). TR 397, lines 4 — 12. About 5% of pregnant women and infants with Medicaid use PWI case management. TR 397, line 13 to 398, line 1; P.Ex. C-20. Defendants estimate that the rate of need for Texas Health Steps medical case management (MCM) would exceed this rate by a small percentage, because they expect that more class members will know about MCM. However, reason defendants, the 7% estimate is too high because it does not account for class members' use of other

forms of case management. TR 364, line 23 to 365, line 13.[145] For this reason, defendants estimate that only 5 to 6% of class members need Texas Health Steps case management. TR 434, fines 18-21 (Testimony of Ms. Bruch).

The above reasoning is seriously flawed. First, defendants have shown only that 5% of pregnant and infant Medicaid recipients actually use PWI case management, not that only 5% of these Medicaid recipients need case management. Second, defendants' reliance on PWI case management data underestimates the need for Texas Health Steps case management, because the PWI case management offers a narrower set of services, thereby reducing the expected population in need of those services.[146] Also, some class members who need Texas Health Steps case management have health problems that are more chronic in nature or are in poorer health than those who need PWI case management. TR 403, line 21 - 404, fine 15; *see also* P.Ex. C-21. Therefore, the need for PWI case management, which offers a different

145. For example, class members may receive case management through the Mental Health/Mental Retardation agency, Early Childhood Intervention (ECI), Texas Commission for the Blind, PWI, Children with Special Healthcare Needs (CSHCN) and the Medically Dependent Children's Program (MDCP). D.Ex. D-6, *see also* D.Ex. D-16. About 60,000 class members received case management through these other programs in fiscal year 1999. P.Ex. C-25.

146. For example, Ms. Tillman testified that her Texas Health Steps case managers see "lots of children with lots of dental issues." TR 75, line 7. But as Ms. Bruch admitted; PWI data do not include class members in need of case management because of dental problems. TR 401, line 8 to 402, line 15.

array of services addressing the health needs of a different population, is not, perhaps, the best starting point for measuring the need for Texas Health Steps case management.

In addition, the different case management programs are not mutually exclusive. Class members may need and be entitled to Texas Health Steps case management even if they also use other forms of case management.[147] Other forms of case management may not be as comprehensive as Texas Health Steps case management. TR 81, lines 8-21.[148] While defendants' regulations prohibit duplication of case management services, P.Ex. C-1, § 33.504(a), they do not prohibit receipt of more than one form of case management if there is no duplication. This reasoning cuts against defendants' decision to reduce their 7% estimate (already questionable due to their reliance on PWI data) to 5 or 6% based on class members' access to alternative forms of case management.

147. For example, class members younger than three years may qualify for ECI case management and TexasHealth Steps case management. TR 381, line 22 to 382, line 1. Class members with mental health or mental retardation diagnoses may seek case management through the Mental Health/Mental Retardation agency, but they may also seek Texas Health Steps case management. TR 383, lines 10-20. Also, some class members with mental health or mental retardation diagnoses may not be able to get assistance from MHMR because of backlogs. TR 383, line 21 to 384, line 1.

148. For example, class member G.V. receives case management through the Commission on the Blind. The Commission case manager "only addresses the visual need issues, such as bringing G. toys to address her visual impairment, and she does not contact [the] mother on a regular basis." Since G. is a medically complex child, she also needed Texas Health Steps case management. P.Ex. C-21; *see also* TR 393, line 20 to 394, line 3.

Appendix D

Utilization

Even assuming that defendants' reasoning is correct, and that they have properly calculated that only about 90,000 to 107,000 class members need case management, by defendants' own estimates, at least 30,000 class members still have unmet case management needs.[149] *See also* TR 406, line 13 to 407, line 5. Since the means by which defendants arrived at these estimates lacks reliability, the actual need for case management may well exceed these estimates.

There is abundant evidence that members' use of Texas Health Steps case management is startlingly lower than the population's true need. From the program's start, in January of 1998, through January of 2000, defendants provided fewer than 33,000 Texas Health Steps case management services.[150] TR 369, lines 7-21; D.Ex. D-9; *see also* D.Ex. D-25. Only 0.3% of all Texas class members aged 1 to 20 used Texas Health Steps case management in the first four months of state fiscal year 2000.[151] TR 421, lines 13-9, Case Management Utilization Report, P.Ex. C-20. This is obviously a much smaller group than need case management, even under defendants' conservative estimates. Furthermore, in more than 120 counties, no class members at all used Texas Health Steps case management in the first four months of fiscal year 2000. P.Ex. C-20.

149. Texas Health Steps case managers assisted only 2,994 class members in fiscal year 1999. P.Ex. C-25.

150. A service is a single contact between a case manager and a family, for example, an assessment or a follow-up phone call.

151. Defendants excluded infants because they are not eligible for Texas Health Steps case management. TR 417, lines 7-17.

Appendix D

As noted above, statewide, there are 1,306,455 class members over the age of one year statewide. Only 4,353 — roughly 0.3% — of them received Texas Health Steps case management. TR 421, lines 13-19. The regional data tells an even more deplorable story of a service almost completely inaccessible to class members. In Hale County, where there were 3,820 class members over the age of one year, not one received Texas Health Steps case management during the first four months of fiscal year 2000. TR 416, line 13 to 417, line 5. In Dallas County, which has 100,012 class members over the age of one, only forty-eight received Texas Health Steps case management. TR 417, line 21 to 418, line 1.[152] In Region 8, which has the highest percentage of class members who use Texas Health Steps case management, only about 1% of class members use Texas Health Steps case management. TR 419, lines 5-22; *see also* TR 88, lines 19-21. And in Region 11, the South Texas region, which is very poor, only 0.2% of class members receive Texas Health Steps case management. TR 421, lines 3-12.

Defendants respond that the gap between the estimated population who need case management and those who receive it can be explained by several factors. First, some class members who need the service may choose not to request it. They may not want case management, may have their management needs met by family or friends, or may receive "targeted" case management from another source, such as the Department of Mental Health and Mental Retardation, Commission for the Blind and Visually Impaired, Texas Department of Health,

152. Ms. Tillman commented that utilization in Dallas County is "considerably low. It's terrible." TR 89, lines 1-9.

or Early Childhood Intervention Program. D.Ex. D-6. However, several of these forms of case management address distinct kinds of medical needs. Moreover, the receipt of case management from another source does not preclude class members from being eligible for Texas Health Steps medical case management where medically necessary.

Defendants also emphasize that there is no waiting list for Texas Health Steps Medical Case Management services, and that plaintiffs have identified no class members who, after requesting the service, were not referred to case management providers. Defendants argue that they provide sufficient case management in every county or cluster of counties because there is no waiting list for Texas Health Steps case management assistance. Ms. Bruch stated that "to our knowledge there has not been a child present that has not gotten connected to case management." TR 373, lines 13-5; *see also* TR 407, lines 10-2, TR 437, lines 2-7, D.Ex. D-14. This argument appears to rely on the "request" language at 42 § 1396a(a)(43)(B). However, the court dispensed with this defense in Section II of this memorandum opinion. That is, under 42 § 1396a(aX43)(A), defendants are obligated to inform eligible participants about the services to which they are entitled. Class members cannot be expected to make requests for services where defendants have failed to make them aware of such services.[153]

153. A discussion of defendants' failure to inform appears in Section I(B).

Sufficient Staffing

Plaintiffs argue, next, that defendants have not recruited a sufficient supply of case managers to meet class members' needs, in violation of the requirement that "sufficient case management" be made "available." ¶ 264. Multiple witnesses testified to the shortage of case managers across the state. TR 53, lines 9-12.[154]

The statistics presented at the hearing support the opinions of these witnesses. At the end of 1999, approved Texas Health Steps case managers could serve 16,707 class members. But,

154. Ms. Tillman testified that there are few Texas Health Steps case managers in Bexar County, TR 82, lines 23-25, and that of those few, several had recently assumed inactive status and no longer saw clients. TR 87, lines 4-9. In addition, Ms. McHan testified that sufficient case management is not available for low income families in Abilene, San Angelo, and the surrounding area. She noted that even though MHMR and ECI case management exists in the area, case management is not sufficiently available "because those particular case management programs are only for a certain group of people." TR 63, lines 11-7. Melinda Metterauer testified that the Texas Health Steps case management provider base is not adequate. TR 869, line 4 to 870, line 3. She based her opinion, in part, on her knowledge of class member D.H.'s experience in November of 1999, of having not obtained service despite having called five case managers. P.Ex. C-21. Ms. Mettauer heads Maximus' Texas Health Steps outreach and informing project. Defendants have contracted with Maximus to provide outreach to class members in several regions of Texas. TR 857, lines 1-18. Maximus is supposed to make special efforts to inform class members about Texas Health Steps case management. TR 372, lines 2-8.

of the 162 approved case managers,[155] 41 were inactive. Thus, at the end of 1999, the actual capacity of defendants' active, enrolled Texas Health Steps case managers was only 13,809. TR 408, line 9 to 410, line 4; P.Ex. C-20. This low capacity is not sufficient to meet even defendants' estimate of class members' need for this service.

The Safety Net

No private Texas Health Steps case managers are enrolled in about 130 of Texas' 254 counties. TR 412, lines 8 — 22; P. Ex. C-20, D.Ex. D-15. Instead, TDH social workers are assigned to these counties; in some counties, only one social worker is assigned. TR 413, lines 5-10.

Two major problems arise when no privately-enrolled case managers serve an area. First, class members have less choice among case managers. TR 85, fines 9-13. This is especially true in the many counties in which only one privately-enrolled Texas Health Steps case manager participates in the program. P.Ex. C-20. Class members' ability to choose their own case managers, who form intimate relationships with class members and their families, is important to the success of the service. TR 413, line 20 to 414, line 1 (Testimony of Ms. Bruch). Second, when no privately enrolled case managers serve an area, Texas Department of Health social workers are supposed to assist class members as case managers.[156] TR 400, lines 7-13.

155. As of the week of the hearing, there were 170 approved Texas Health Steps case managers. TR 370, lines 16-9.

156. TDH employs about 100 social work stafff in the regions. TR 374, lines 7-10.

However, these Texas Health Steps case managers are available only on a limited basis in those counties.[157] TR 125, lines 5-8.

TDH social workers are overwhelmed in their capacities as "safety net" case managers. For example, TDH social workers in Regions 2/3 and 9/10 have caseloads of about 500 to 600 clients.[158] They work in several different programs. In contrast, a full-time case manager at the Parent Case Management Program (PCM) handles twenty-five to fifty children. TR 48, line 23 to 49, fine 2. (Testimony of Ms. McHan).

Recruitment

Defendants' low reimbursement rates for Texas Health Steps case management contribute to the shortage of case managers.[159] According to a 1998 internal TDH memo,

157. Ms. Bruch testified that TDH social workers are assigned to several different programs. Thus, it is not common for a social worker to be assigned only to Texas Health Steps case management. TR 441, lines 1-10.

158. Ms. McHan testified that such a load is "definitely . . . too much . . . to handle as a social worker." TR 51, line 16 to 53, line 8.

159. Defendants pay Texas Health Steps case managers $54.58 for case management assessments and face-to-face visits. TR 373, lines 10-3, P.Ex. C-24. They pay $18.00 for phone contacts. P.Ex. C-24. Defendants apparently based the reimbursement rates for Texas Health Steps case management on reimbursement for other forms of (Cont'd)

the reimbursement rates for Texas Health Steps case management are "woefully inadequate in comparison" with other state agencies' payment rates for their case management services. P.Ex. C-21. This evidence is consistent with the fact that PCM cannot afford to hire staff qualified to provide Texas Health Steps case management for the reimbursement that defendants pay. TR 54, line 18 to 55, line 7. (Testimony of Ms. McHan). The rural nature of PCM's practice — and of many potential providers of case management — exacerbates the problem, because such providers "may be sending staff out to drive several hours, meet with a family for several hours, [and] drive back for several hours, for $54.[160] TR 55, lines 5-7.

These low reimbursement rates have a tangible effect on enrollment and withdrawal from the case management

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case management developed many years prior to the start-up of the Texas Health Steps case management program. TR 425, line 7 to 426, line 4. In addition, the reimbursement rates have not changed very much over time. TR 436, lines 18-20.

160. According to the June 1999 comments of the Smith County Public Health District's (East Texas) coordinator of case management, "An agency providing Texas Health Steps Medical Case Management would have a difficult time maintaining a case manager with the current reimbursement schedule and pay for the case manager's salary, travel, FICA, health/sick/and vacation benefits and the cost of office support and supplies." Hs recommendation was to increase the reimbursement rates to ensure the viability of the program. P.Ex. C-21.

program.[161] In Bexar County, Texas Health Steps case managers are taking inactive status primarily because they cannot stay in business given the current low rates of reimbursement.[162] TR 87, lines 4-17. Potential case managers do not enroll with Texas Health Steps case management because the low rates make it extremely difficult to pay the salaries required to hire needed social workers and nurses with professional experience. TR 91, line 16 to 92, line 1.[163]

161. Defense witness Ms. Bruch confirmed that defendants' low reimbursement rates discourage the enrollment of Texas Health Steps case managers. The low reimbursement rate is "one of the top deterrents" cited by providers and potential providers. TR 423, lines 14-21. Defendants' survey of Texas Health Steps case managers also reports providers' complaints about low levels of reimbursement. P.Ex. C-20 at 8.

162. For example, in October of 1999, provider organization "ASAP" wrote tht their program's Board of Directors were considering phasing out case management beeause the low rates did not cover their costs. P.Ex. C-21.

163. Ms. Singleton, for example, testified that Agape Clinics would like to become a Texas Health Steps case manager. TR 216, lines 4-9. Her reasons for not applying related solely to "[t]he financial aspect of whether or not what is expected can be done for the fees that are established, and not knowing what the time frame on reimbursement would be." TR 210, line 20 to 211, line 7. Agape Clinics are located in Dallas and Tarrant Counties, in Region 3. TR 157, lines 5-11. In those two counties, there are 155,401 class members over the age of one year. In the first four months of fiscal year 2000, only 560 (.3%) of them received Texas Health Steps case management. P.Ex. C-20. Similarly, Page One Healthcare Solutions, Inc., of Dripping Springs wrote in January of 1999 that the company "was quite interested in workidt,with:your agency providing case management for the children of Central Texas" but that "that reimbursement rates were such that the equation simply was not balance-able." P.Ex. C-21.

One of the reasons for the failure of reimbursement rates to meet providers' costs appears to be that the cost of conducting home visits is not reimbursed. Instead, defendants pay Texas Health Steps case managers a flat fee of $54.58 for initial, comprehensive "assessments." TR 424, lines 13-15. But $54.58 does not begin to cover the cost of a home visit in many parts of the state. P.Ex. C-21; TR 423, line 25 to 424, line 19; TR 430, lines 1-6. For example, for an assessment to be comprehensive, it must be done in the client's home. TR 430, lines 7-10. Home visits are more comfortable for the client and make it easier for the case manager to establish a rapport and to receive an accurate picture of the client's needs. TR 430, lines 11-16. If the family lives in substandard housing, the case manager can assess the level of risk that the home itself imposes. TR 430, lines 17-21. It generally takes about one to three hours to do an initial, comprehensive Texas Health Steps case management assessment. TR 423, line 25 to 424, line 12.

Although defendants originally based their Texas Health Steps case management payment rates on other programs' payment structure, Texas Health Steps case managers are not reimbursed for certain services for which case managers in other programs receive reimbursement. For example, unlike PWI case managers, Texas Health Steps case managers are not paid for initial intake sessions.[164] TR 426, line 25 to 426,

164. Case managers and coalitions of case managers from various parts of the state have complained to defendants that the Texas Health Steps case management payment rates are too low. TR 426, line 7 to 428, line 23. For example, the Hidalgo-Starr Counties Case Management Coalition and the Cameron-Willacy (Cont'd)

line 15; P.Ex. C-23. This continuing disparity[165] makes it extremely difficult to attract Texas Health Steps case managers. P.Ex. C-21; *see also* TR 428, line 24 to 429, line 16.

In addition to low rates of reimbursement, the cumbersome application process itself appears to inhibit many case managers from participating in Texas Health Steps case management.[166] For example, in October of 1999, a case management provider applicant still had not received a provider number even though defendants had approved the applicant in December of 1998. P.Ex. C-21. Defendants' internal memos demonstrate their knowledge of this paperwork problem. P.Ex. C-21; *see also* TR 431, lines 15-18. Payment delays also cause problems. One witness testified that 10-30% of CORE's claims are not paid, TR 92, lines 2-7, which forces her staff to tap into personal funds to meet payroll costs.[167]

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Counties Case Management Coalition, both from South Texas, have asked defendants to reimburse Texas Health Steps case managers for completing initial intake forms. P.Ex. C-21. As stated above, Defendants reimburse PWI case managers for initial intake interviews. TR 426, line 25 to 427, line 15.

165. *See* D.Ex. D-14. Defendants increased the reimbursement for face-to-face follow-up visits from $18.00 to $54.58. *See also* D.Ex. D-14.

166. At the time of the hearing, defendants were in the process of revising their application form to simplify it. TR 375, lines 5-13; D.Ex. D-18.

167. Ms. Tillman also testified that because of the low reimbursement rates, CORE currently cannot afford to pay three of its owners who work full time at CORE, without whom CORE could not function. TR 93, line 10 to 94, line 17.

TR 93, lines 4-9 (Testimony of Ms. Tillman). Another testified that payment delays create significant cash flow problems for Texas Health Steps case managers because many case management organizations are small businesses. TR 430, line 22 to 431, line 14 (Testimony of Ms. Bruch).

Finally, Texas Health Steps case management is under-utilized because class members do not know that the service is available. TR 90, lines 8-10. Vital referral sources, such as healthcare providers, school staff, and employees of community agencies, frequently do not know about Texas Health Steps case management.[168] TR 90, lines 10-21. However, Texas Health Steps case management is very well-received by referral sources once they are informed about the program. CORE "immediately began getting referrals" once referral sources learned of its services. TR 90, line 22 to 91, line 8.

C. Violations of Decree

Defendants point to the number of medical case management provider recruitment activities that they have conducted. TR 357, line 11 to 360, line 4; TR 367, line 12 to 368, line 3; D.Ex. D-7, D-12, D-13, D-24. They note the steady progress

168. Defense witness Margaret Bruch testified that one reason that Texas Health Steps case management utilization is so low is that families do not know about the service. TR 422, lines 79. Also, she testified that many referral sources such as school nurses, school social workers, doctors, and dentists are still unaware of Texas Heazlth Steps case management. TR 431, line 19 to 432, line 7, and therefore cannot refer class members to case managers. TR 432, lines 8-12.

made recently in recruiting providers, TR 369, line 23 to 370, line 12; D.Ex. D-10, and point to a recent increase of the reimburseinent rate for face-to-face follow-up activities. D.Ex. D-10, D-14. They report that since January of 1998, the number of medical case management services provided has increased every month, rising from 5,000 services to over 30,000 services in January of 2000. D.Ex. 9. Nevertheless, despite defendants' recruitment efforts, and despite the gradual increase in the number of approved case managers, there is still a serious shortage of Texas Health Steps case managers.[169]

Based on the findings of fact set out above in Section VI(B)(1) through VI(B)(5), defendants are found to be in violation of paragraphs 248 and 264 of the decree. The

169. Defendants point to a comparative study that allegedly shows that Texas compares favorably to other states in providing case management services. Defendants surveyed several states about their case management efforts for children who have Medicaid. D.Ex. D-21, D.Ex. D-32. They found that fewer than one-half of the states provide four or more targeted case management programs. They also found that about one-half of the states provide EPSDT case management. TR 377, line 7 — 378, line 19. Based on this survey, Ms. Bruch thinks that Texas compares "very favorably to other states." TR 378, lines 17-9. However, as noted earlier, the performance of other states, because they are not bound by the decree in this case, is not relevant to defendants' compliance. In short, the poor performance of other states relative to Texas does not excuse defendants' failure to comply with the decree. Furthermore, neither the number of case management programs offered by Texas, nor its decision to provide EPSDT case management is at issue in this case. Having opted to provide these services, defendants are bound by the requirements of federal law on which plaintiffs first based their claims, and in which the decree is grounded.

dramatic underutilization of the service of case management, coupled with a well-demonstrated need for the service, leads the court to conclude that defendants have failed to provide medical case management services to the plaintiff class. Plaintiffs have amply demonstrated defendants' failure to make case management available in every county or cluster of counties in the state.

VII. Issue Seven: Outcome Measures

A. Overview

In an effort to "measure whether recipients receive the full range of services that they need and are entitled to receive," ¶ 288, the parties agreed to create "health outcome indicators." ¶¶ 286-297. The decree states that these indicators should be "chosen wisely" by the parties and should be "diverse enough to gauge the health of the entire EPSDT population, not merely factions of the population." ¶ 289. The parties agreed to develop a list of health outcome indicators by September 1, 1995. ¶ 293. On August 30, 1995, the parties submitted a Joint Notice Concerning Outcome Measures to the court ("Joint Notice").

The parties also agreed to create "target goals" for each indicator. ¶ 294. Defendants agreed to report the "best available information on each health indicator annually, beginning on September 1, 1996 and continuing through 1999," through the use of a methodology approved by plaintiffs. ¶ 295. Finally, defendants agreed to develop, by January of each year, corrective action plans to "address all matters within Defendants' control to improve results for each indicator"

for which the target goal was not reached. ¶ 296. The plans are to be presented for plaintiffs' suggestions, which may not be unreasonably rejected by defendants. *Id.*

B. Findings of Fact Regarding Violations of Decree

Plaintiffs allege that defendants have failed to comply with their obligations under these paragraphs by failing to provide plaintiffs with outcome studies that meet the standards in both the decree and the Joint Notice, failing to obtain the consent of plaintiffs' counsel regarding three substitute outcome measures introduced by the defendants, failing to create adequate corrective action plans, and failing to abide by the deadlines in the decree. Each contention will be addressed in turn.

Joint Notice Measures

Plaintiffs' complaints about defendants' outcome measures as required by the Joint Notice begin with the first indicator, Joint Notice Measure #1, which measures the rate of immunization among the plaintiff class. P.Ex. OM-9 at 12. Plaintiffs complain, first, that defendants' data is not compiled annually, but is instead provided biannually. Defendants respond that immunization surveys take significant time to complete, and that the opportunity to evaluate new intervention strategies designed to improve immunization rates has required at least a two-year cycle. Nevertheless, defendants agreed to the term "annually." Moreover, the immunization indicator appears in the express language of the decree at paragraph 290. Therefore, when defendants agreed to the annual provision of the best available data on each

indicator, they specifically included this indicator. For these reasons, it is found that defendants' biannual compilation of immunization data violates paragraph 295.

In addition, plaintiffs complain that defendants' 1998 immunization study sample size was too small to yield adequate data about racial and ethnic subgroups, as required by Joint Notice Measure #1. Defendants have not furnished any reliable evidence that their 1998 data was the "best available," as required by paragraph 295. They have not explained, to the satisfaction of the court, why they were unable to create the requisite sample sizes that would have yielded the desired racial data. It is therefore concluded that defendants have not furnished plaintiffs with the best available data on this indicator for the year 1998. Thus, in 1998,[170] defendants failed to comply with paragraph 295.[171]

Plaintiffs also object to the exclusion from study of hundreds of thousands of class members who are enrolled in managed care. D.Ex. D-62.[172] To evaluate this objection,

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170. Defendants note that immunization data by race and ethnicity for the years 1994 and 1996 were reported. P.Ex. OM-9 at 12. In addition, defendants plan to survey and provide results by race and ethnicity for the years 1999, 2000, and 2002. D.Ex. D-71, D-72.

171. Sinularly, defendants have not provided plaintiffs with the racial and ethnic data required by Joint Measure #4 for any year, again in violation of paragraph 295.

172. Mr. Blanton admitted that for some studies, defendants do not have data about class members in managed care. TR 519, lines 13-17.

the court must examine paragraph 295, which contemplates an ongoing exchange between the parties concerning the specific methodology to be used to report on each indicator:

> 295. Defendants will report the best available information on each health indicator annually, beginning on September 1, 1996 and continuing through 1999. The EPSDT program will arrange for studies to evaluate the health of the EPSDT population, including each health outcome indicator. Defendants will present their proposed methodology for Plaintiffs' approval by April 1, 1996. Plaintiffs will not unreasonably withhold approval. If they approve, Plaintiffs may make suggestions. Defendants may accept or reject the suggestions.

This language is interpreted to mean that defendants' failure to report on an indicator or specifically enumerated sub-indicator — such as their failure to provide any data by race as required by Joint Notice Measures #1 and #4, above — will nearly always[173] constitute a failure to provide the "best available information." However, a disagreement over methodology must be treated differently. The court must

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173. In the court's view, it would be difficult for defendants to argue that the failure to provide *any* data on an indicator or sub-indicator constitutes the provision of the "best available information," since terms of paragraph 295 dictate that defendants themselves are responsible for generating the information through studies. Thus, defendants are under an obligation to conduct the studies that will give them the "best available information" for each indicator.

decide whether defendants have provided the "best available information" or whether plaintiffs have withheld their approval of defendants' methodological decisions "unreasonably." The phrase "best available information" is held to be ambiguous. The court must therefore determine, as best it can, what the parties meant by the phrase with regard to each methodological decision challenged by plaintiffs.

Have defendants provided the "best available information" regarding the indicators for which they have excluded managed care data, or have plaintiffs withheld their approval of the exclusion "unreasonably"? Paragraph 191 provides a clear answer: defendants must assure that "information for outcomes research as needed" is collected from "each managed care organization." ¶ 191. In light of paragraph 191, the phrase "best available information" is not ambiguous in relation to managed care data. Therefore, in failing to collect data on managed care enrollees, defendants violated both paragraph 191 and paragraph 295.

Next, with regard to Joint Notice Measure #5, plaintiffs complain that defendants have limited their study of lead poisoning in the class to a study of class members whose blood samples have been submitted to the Texas Department of Health laboratory for testing. Does this limitation render defendants' information less than the "best available"? No other provisions related to lead-poisoning in the decree can guide the court in answering this question. Paragraph 289 at first glance appears promising, with its requirement that indicators be "diverse enough to gauge the health of the entire EPSDT population, not merely factions of the population." ¶ 289. This paragraph speaks directly to the selection of

indicators, not to methodologies used in generating the best available information about those indicators, but it could be used by the court to give meaning to the ambiguous phrase "best available." However, paragraph 289 appears to be aimed at the exclusion of particular groups (such as young females or teenage males) from consideration. There is no evidence that defendants' use of the blood registry data unduly excludes a particular "faction" from study. Thus, while defendants are strongly encouraged to expand their studies to include class members whose blood is not currently reported in the registry, they will not be held in violation of the decree for relying solely upon the blood registry.

Plaintiffs also note that although defendants are obligated under Joint Notice Measure #5 to re-evaluate at the age of 24 months the blood lead levels of EPSDT children who had high lead levels at 12 months, defendants fail to do so because their "registry cannot distinguish a child whose second test was normal from a child who never received a second test." P.Ex. OM-9 at 9; TR 527, line 11 to 528, line 14. The court agrees that, because they have failed to report an enumerated indicator, defendants have failed to provide the "best available" data regarding that indicator. Defendants insist that they cannot provide the re-evaluation data because of the configuration of their registry. Nevertheless, defendants have plainly failed to meet their obligation to "arrange for studies to evaluate the health of the EPSDT population, including each health outcome indicator." ¶ 295.[174]

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174. In light of defendant's obligation to provide the re-evaluation data, and their current inability to report on this indicator through the use of registry data, it appears that the registry-based

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Plaintiffs' complaints concerning Joint Notice Measures #8 and #9 will be treated similarly. In both instances, plaintiffs regard defendants' decision to restrict data collection to certain subsets of the population as in violation of paragraph 295. However, it is found that defendants' decision to proceed with methodologies based on Women's Infants' and Children's Program ("WIC") data (#8) and on data from the previously mentioned blood registry (#9), do not violate paragraph 295, because defendants have demonstrated the data for each indicator to be the best available. The Joint Notice itself authorizes TDH, not the plaintiffs, to "establish the methodology" for these measures. *See* Joint Notice at 3. Plaintiffs have proffered no evidence that defendants' reported data is not the "best available."[175]

Finally, plaintiffs correctly assert that defendants have failed to provide the best available data for Joint Notice Measures 10 and 11. No data has been provided regarding Measure 10, which deals with the mental health of class members. Regarding Measure 11, which deals with asthma, the language of the Joint Notice clearly requires the reporting of the rate of hospitalization or the number of hospitalizations by year, not, as defendants maintain, the average length of stay

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methodology — held to be sufficient for part of Joint Notice Measure #5 — does not currently provide defendants with sufficient data to be in full compliance with the reporting requirements for all sub-parts of the indicator.

175. Such evidence might, for example, have taken the form of an illustration of how a broader class member base might have been studied.

for a patient hospitalized. It is found that the "best available" data has not been provided for either of these Joint Notice Measures.

Unilateral Substitution of Measures

The parties agree that three of the originally agreed-upon outcome measures cannot reasonably be studied by defendants. After discovering this, defendants apparently unilaterally substituted those measures with three new measures, without securing the plaintiffs' agreement as required by paragraphs 289 and 293. The substitutions, plaintiffs argue, caused defendants' outcome measurements to be unduly focused on the health of infant/toddler and pregnant teenage class members. They note that there is only one indicator that gauges the health of teenagers who are not pregnant. Hence, argue plaintiffs, defendants' indicators are not "diverse enough to measure the health of the entire EPSDT population, not merely factions of the population." ¶ 289.

The court need not evaluate the "diversity"of the various outcome measures selected by the parties, for the decree mandates that the parties select such indicators "together." ¶ 289. Thus, both parties must "agree" to "change, add, or delete indicators." ¶ 293. It is therefore held that defendants may not fulfill their obligations under the outcome measurements portions of the decree through the study of variables that were not agreed upon by both parties to this action.

Appendix D

Corrective Action Plans

Having received defendants' 1999 target goals and corrective action plans, plaintiffs have formulated their commentary and suggestions pursuant to paragraph 296. P.Ex. OM-19, OM-21. Plaintiffs' primary complaint with many of defendants' proposed plans is that they "do not aim high enough." Plaintiffs' Prehearing Motion to Enforce the Consent Decree. However, the decree gives the court no authority to evaluate the substance of defendants' target goals and corrective action plans. Plaintiffs are correct in noting that under paragraph 294, "target goals" are to be set together by the parties, and may not be set unilaterally by defendants. Moreover, under paragraph 296, defendants may not "unreasonably reject" plaintiffs' suggestions in respons to defendants' proposed plans. However, no evidence that defendants have unreasonably rejected plaintiffs' suggestions was presented to the court. Both parties should recognize that the court will not intervene in the ongoing negotiations between the parties. That these processes were built into the mechanisms of the decree reflects the reality that the parties themselves are in the best position to reach an agreement regarding issues of methodology, and to set and revise target goals.

Timing

Defendants failed to provide their 1999 corrective action plan in January, as required by paragraph 296. More importantly, defendants have provided only one corrective action plan, although the decree mandates that they were to have been provided annually from 1996 through 1999. Defendants have

Appendix D

also fallen significantly behind on their annual reports of the outcome data, also required annually, upon which these corrective action plans are to be based. Defendants' tardiness in preparing their first corrective action plan means that defendants cannot possibly consider plaintiffs' comments and then revise their plan in time to implement it in 1999, as envisioned by the annual corrective action plan process.

As noted above, reports for some agreed-upon indicators have not been completed, while reports for others are late or incomplete.[176] Therefore, defendants will be held in violation of paragraph 295 for their untimely furnishing of outcome data to plaintiffs, and in violation of paragraph 296 for their failure to complete annual corrective action plans based on the incomplete data that they possessed. However, it is also noted that defendants have voluntarily taken steps to institutionalize outcomes measurement in the Texas Health Steps Program, and have offered to extend reporting outcome measures beyond the time frames stated in the decree. TR 506, lines 21-24; D.Ex. 71. These ongoing efforts to accommodate the needs of the plaintiff class will be reflected in the order of enforcement issued pursuant to this memorandum opinion.

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176. Defendants maintain that these delays were exacerbated by plaintiffs' having limited communication between their epidemiological expert and defendants. D.Ex. D-71; *see also* TR 506, lines 12-7. Plaintiffs respond that epidemiologists normally prefer to review written proposals for research studies to evaluate them fully, and that defendants have failed to provide any written proposals for their expert to review despite repeated requests. The court is in agreement with the plaintiffs that it is unreasonable for defendants to demand that plaintiffs commit the time of their expert, Paul Newacheck, without first providing requested written materials.

Appendix D

VIII. Issue Eight: Training for Healthcare Providers

A. Findings of Fact

"To adequately serve recipients, providers must understand how EPSDT works. They must also understand EPSDT recipients' needs." ¶ 104.[177] The decree targets for improvement defendants' "educational programs for professionals, so that healthcare providers [can] understand how Medicaid and EPSDT work." Fairness Order at 31.

The evidence demonstrates that many healthcare providers who serve class members do not understand their cultural and economic situations, and that without this understanding, they cannot properly assist class members.[178] Defendants'

177. The importance of provider training is discussed in more detail under Section IV(E), which deals with the training of providers within the managed care system.

178. For example, one witness testified that

> [A]s a result of a lack of understanding on the part of the staff and the provider, [there] are very judgmental attitudes about unkept appointments, about not following through on recommendations for brushing or caring for the children. . . . [T]hose sorts of attitudes . . . by the providers act as a barrier to these families because they don't want to be treated that way. They don't want to have their children treated that way. [I]f we could improve the understanding on the part of the providers about the patient population, we could improve the atmosphere in the offices, . . . and make it a more

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Appendix D

expert Mr. Millwee agreed that training about cultural sensitivity is one of the most important components of training for professionals who work with class members. TR 937, line 24 to 938, line 6. *See also* P.Ex. —23. Class members' parents also testified at length about specific instances in which healthcare providers had treated them harshly. In addition, defendants have received complaints about healthcare providers' improper treatment of class members. P.Ex. CH-24, CH-2.

The evidence also reveals that it is extremely important for healthcare providers to be trained to work with class members and to understand how the Medicaid program functions:

> It's very important because they may be the primary contact that the family has. . . . [providers and staff] need to know about Medicaid, about

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> welcome environment and make families more willing to be there to receive care.

TR 297, line 22 to 299, line 8. (Testimony of Dr. Seale). Another witness often hears from physicians and clinics the myth

> that Medicaid patients don't care enough to keep their appointments or just blew it off. . . . [I]f they had a better understanding of what it's like for families to live under those circumstances and what sort of barriers there are that might prevent them from coming, number one, their attitude would be different and, number two, they would probably have more kept appointments in their office.

TR 44, lines 12-21 (Testimony of Ms. McHan).

> the other services that Medicaid offers. Oftentimes from our experience all the physician's office [knows] is, is Medicaid going to cover the visit? It would be most helpful if there was staff in the office . . . who could advise the family.

TR 43, line 14 to 44, line 2 (Testimony of Ms. McHan). Class members do not receive services when providers do not know that they exist, and have difficulty getting to a specialist when referring physicians do not know that transportation assistance is an option.[179] TR 45, lines 19-22.

B. Findings of Fact Regarding Violations of Decree

The decree orders, in clear and mandatory language, the creation of various types of training by defendants. Nonetheless, defendants have yet to complete even their Requests for Proposals ("RFPs") that would enable them to contract with training groups for training at professional schools, ¶ 107,[180] EPSDT training associated with other "high caliber" training,

179. Plaintiffs provided other examples of providers' misunderstanding of the scope of Texas Health Steps Coverage. One such example arose in Region 1, in the Panhandle. A pediatric dentist required a father to pay an emergency fee before treating a class member. P.Ex. M-20; *see also* P.Ex. A-8 at 8. The six-year-old class member had to travel from Amarillo to Lubbock for corrective treatment because the local dentist did not understand that Medicaid would by law reimburse him in full.

180. Paragraph 107 provides that "[d]efendants will provide information and facilitate ongoing training about Medicaid and EPSDT at all relevant professional schools in Texas. 'Relevant professional schools' include all schools that train healthcare providers who could serve EPSDT recipients. . . . "

¶ 108,[181] training about mental health services, ¶¶ 112-14,[182] training about new issues, ¶ 117,[183] training about cultural sensitivities and the realities of EPSDT recipients' lives, ¶¶ 118-20,[184] and ongoing training for pharmacists. ¶¶ 124-130.[185] In other words, defendants are still in the beginning stages of projects that should have been fully implemented long ago.

181. Paragraph 108 provides that "[d]efendants will make staff available to participate in ongoing training in conjunction with appropriate professional training. 'Appropriate professional training' means training about issues that are relevant to the provision of services to EPSDT recipients, such as how to conduct a medical checkup for a teenager. . . "

182. Paragraph 112 provides that "[d]efendants willl facilitate training for professional about the importance of and how to conduct mental health assessments for indigent children and youth. . . . "

183. Paragraph 117 provides that "[a]s time goes by, new clinical issues will arise that are important to the provision of care to EPSDT recipients. Defendants will facilitate training in those areas."

184. Paragraph 120 provides that "[d]efendants will develop training modules designed to be included in other training programs about the realities of EPSDT recipients' lives to attempt to improve providers' attitudes toward recipients. These training materials will be provided to professional schools.

185. Paragraph 129 states that "[b]y January 31, 1996, Defendants will implement an initiative to effectively inform; pharmacists about EPSDT, and in particular about EPSDT's coverage of items found in pharmacies. . . . " Paragraph 130 mandates that "[b]y July 31, 1996, Defendants will conduct a professional and valid evaluation of pharmacists' knowledge of EPSDT coverage of items commonly found in pharmacies. They will report the results of the evaluation to Plaintiffs by September 1, 1996. . . . "

Perhaps anticipating this court's finding, defendants developed an RFP for healthcare provider training in December of 1999, and are awaiting plaintiffs' responses. D.Ex. D-105. The Director of Texas Health Steps testified that this RFP would be published in the Texas Register within two months of the hearing, and that a contract would likely be awarded within six months. TR 923, lines 22-25.[186] While defendants' recent efforts to procure provider training services are applauded by the court, they do not change this court's finding that because the training has not been adequately provided, defendants are in violation of the training provisions of the decree.[187] Therefore, it is found that defendants are in clear violation of the above-cited training provisions of the decree.

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186. Mr. Milwee also testified that some of the provisions in the RFP go beyond the requirements of the decree, including a video program that will be used to recruit and educate providers. TR 923, lines 15-18. Defendants' continuing efforts, in some areas, to go above and beyond the requirements of the decree have not gone unnoticed by the court. It is sincerely hoped that these extra efforts will benefit the children whom Texas Health Steps was designed to serve.

187. It became apparent at the hearing that defendants have, in fact, provided some degree of training to nurses. TR 183, lines 11-15.

PART TWO:

DEFENDANTS' OBJECTIONS TO ENFORCEMENT OF DECREE

As is described in Part One, defendants opposed virtually all of plaintiffs' proposed findings of fact. Defendants also argued, in the alternative, that certain provisions of the decree are unenforceable against them, even were the court to find violations of those provisions. Defendants challenge this court's authority to enforce the decree on two bases. First, they argue that some of the rights on which decree paragraphs are based are not enforceable through 42 U.S.C. § 1983.[188] Second, they argue that this court may not enforce certain provisions of the decree consistent with the protection afforded state defendants by the Eleventh Amendment. Each objection will be considered in turn.

Issue I: Enforcement of the Medicaid Statute

A. Law of the Case

Before addressing the merits of defendants' first argument, the court pauses to note that this is not the first time that the court has addressed the issue of the enforcement of EPSDT provisions via § 1983 during the course of this litigation.

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188. 42 U.S.C. § 1983 provides that "[E]very person who, under color of any statute, ordinance, regulation, custom or usage of any state . . . subjects, or causes to be subjected, citizens . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law. . . ."

In an order issued by this court on August 10, 1994, defendants' motion to dismiss was denied except as to the state agency defendants. In that order, defendants' arguments that the EPSDT provisions found at 42 U.S.C. §§ 1396a(a)(43) and 1396d(r) could not be enforced by plaintiffs in a § 1983 action were explicitly rejected. Specifically, in that order, this court held those provisions to be clearly and unambiguously enforceable through § 1983 under the Supreme Court's framework first set out in *Wright v. City of Roanoke Redev. & Hous Auth*, 479 U.S. 418 (1987), and further developed in *Wilder v. Virginia Hosp. Assn*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 503 U.S. 347 (1992).

Under the "law of the case" doctrine, a court should not reopen issues decided in earlier stages of same litigation. *See, e.g., Agostini v Felton*, 521 U.S. 203, 236 (1997). However, because defendants re-urge their argument based on Supreme Court case law decided since 1994, the merits of defendant's objection will be considered in brief. The discussion which follows disposes of defendant's more recent challenge while fortifying the court's prior holding that the above-cited provisions may be enforced by plaintiffs via § 1983.

B. Supreme Court Jurisprudence on Enforceable Rights

The Supreme Court has held that § 1983 safeguards certain rights conferred by federal statutes. *Maine v. Thiboutot*, 448 U.S. 1 (1980). However, in order to seek redress through § 1983, a plaintiff must assert the violation of a federal right, and not merely a violation of federal law. *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103, 106 (1989). Recently,

the Supreme Court reiterated the test to determine when federal statutes confer rights that are actionable through 42 U.S.C. § 1983. *Blessing v. Freestone*, 520 U.S. 329 (1997). Under that test, three distinct factors must be examined by a court when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. *Wright*, 479 U.S. at 430. Second, the right must not be so "vague and amorphous" that its enforcement would strain judicial competence. *Id.* at 431-32. Third, the statute must unambiguously impose a binding obligation on the States. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 510-11 (1990).[189]

Once a plaintiff demonstrates that a federal statute creates an individual right, there is a rebuttable presumption that the right is enforceable. However, the right will be unenforceable if Congress "specifically foreclosed a remedy under § 1983." *Smith v. Robinson*, 468 U.S. 992, 1005, n. 9 (1984).

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189. The Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), which followed *Wilder* but preceded *Blessing*, has produced much confusion and debate. The Fifth Circuit has refrained from deciding the impact of *Suter* on *Wilder*. *Resident Council of Allen Parkway Village v. United States Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1051 (5th Cir.1993). In *Travelers Health Network v. Orleans Parish Sch. Bd.*, 842 F.Supp. 236, 240 (E.D.La.1994), the court followed the Seventh Circuit's approach in *Procopio v. Johnson*, 994 F.2d 325, 331, n. 9 (7th Cir.1993), by "proceeding with the two-step *Wilder* analysis and bearing in mind the additional considerations mandated by *Suter*." 842 F.Supp. at 240. *See also Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519, 525 (8th Cir.1993) ("synthesizing" *Wilder* and *Suter*). This court will take the same course.

Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994).[190]

C. The EPSDT Provisions of the Medicaid Act

The starting point for determining whether a statute creates an enforceable private right of action is the statute itself. The Medicaid program is a cooperative program between the federal and state governments, providing medical services to qualified recipients. State participation in the Medicaid program is voluntary. If a state chooses to participate, however, it must comply with the requirements outlined in the Medicaid subchapter of the Social Security Act. *Wilder*, 496 U.S. at 502; 42 U.S.C. § 1396a. A participating state must submit a plan for providing medical services to qualified

190. As was noted in this court's 1994 order, the Supreme Court analyzed a provision of the Medicaid Act, the same statute at issue in the instant action, in *Wilder v. Virginia Hosp. Assn*, 496 U.S. 498 (1990). In *Wilder*, healthcare providers claimed that they had been deprived of their right, under 42 U.S.C. § 1396a(a)(13)(A), to Medicaid payment both "reasonable and adequate to meet the costs incurred by efficiently and economically operated facilities." The Court held the relevant provision of the Medicaid Act enforceable under § 1983 because: a) the plaintiff healthcare providers were the intended beneficiaries of the provision at issue; b) the provision imposed a binding obligation on participating states to adopt reasonable and adequate rates; c) the statute set out factors which a state must consider in adopting its rates; and d) the administrative scheme at issue was not sufficiently comprehensive to demonstrate a congressional intent to preclude § 1983 relief.

recipients, which is approved and partially subsidized by the federal government. *See* 42 U.S.C. § 1396. The requirements that the state plan for medical assistance must satisfy are provided in § 1396a(a). In this case, plaintiffs seek to enforce provisions in a decree based on rights set forth in the Early Periodic Screening, Diagnosis and Treatment sections of the federal Medicaid Act; specifically, the provisions that mandate that a state's Medicaid plan must provide for:

- "informing all persons in the State who are under the age of 21 . . . [and qualify for Medicaid] of the availability of early and periodic screening, diagnosis, and treatment services as described in [§ 1396d(r)(5)] and the need for age-appropriate immunizations against vaccine-preventable diseases" 42 U.S.C. § 1396a(a)(43)(A).

- "providing or arranging for the provision of such screening services in all cases where they are requested" 42 U.S.C. § 1396a(a)(43)(B).

- "arranging for (directly or through referral to appropriate agencies, organizations or individuals) corrective treatment the need for which is disclosed by such child health screening services" 42 U.S.C. § 1396a(a)(43)(C).

Plaintiffs also seek to enforce their rights to the following:

- medical check ups according to a properly prescribed schedule and at other intervals when needed, "which shall at a minimum include —

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

(iii) appropriate immunizations according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance)" 42 U.S.C. § 1396d(r)(1).

- dental services including check ups according to a properly prescribed schedule and treatment, "which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health" 42 U.S.C. § 1396d(r)(3).

- the full range of healthcare services allowed by the federal Medicaid statute, 42 U.S.C. § 1396d(r)(5), including but not limited to case management. 42 U.S.C. §§ 1396(a)(19); 1396n(g)(2).

The *Wilder/Blessing* framework may be easily applied to these provisions. First, the statutory sections are clearly intended to benefit plaintiffs and the class. "EPSDT . . . is . . . the nation's largest preventive health program *for children*." H. R. 3299, 101st Cong. § 4213 (1989) (emphasis added). Congress also noted that as more children qualified

for Medicaid because of federal expansions in the Medicaid program, "the EPSDT benefit will become even more important to the *health status of children* in this country." *Id.* (emphasis added). Additionally, the plain language of the statute demonstrates that Congress was attempting to increase preventive healthcare services for minor Medicaid recipients. *See* 42 U.S.C. § 1396a(43).

The second prong of the *Wilder/Blessing* test asks whether the language of the statute is mandatory rather than precatory. *Wilder*, 496 U.S. at 512. In this case, the language is clearly mandatory: a state plan *must* provide for informing all eligible minors of the availability of the EPSDT services, provide for the providing or arranging of the services, and provide for the arranging for corrective treatment.[191] More

191. *Suter v. Artist M.*, 503 U.S. 347 (1992), contains language which might be interpreted to foreclose the enforceability of any statutory provision in a section of a law specifying the content of a state plan. On October 20, 1994, Congress attempted to resolve the confusion about the impact of *Suter* by amending the Social Security Act, which includes the Medicaid provisions at issue in this case. 42 U.S.C. § 1320a-2. The amendment provides that in an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable merely because of its inclusion in a section of the Act requiring a state plan or specifying the required contents of a State plan. Most courts have interpreted the amendment to restore the *Wilder* test pre-*Suter*. *See Visiting Nurse Assoc. of North Shore, Inc. v. Bullen*, 93 F.3d 997, 1003, n. 5 (1st Cir.1996), ("Congress intended that [the amendment] serve to resurrect the *Wilder* test, with no *Suter* overlay"); *Stanberry v. Sherman*, 75 F.3d 581, 583-584 (10th Cir.1996) ("Basically, the Congress disavowed *Suter*'s approach. . . . It also reaffirmed the approach taken in the Supreme Court decisions prior to *Suter*.").

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concisely, state plans "must . . . provide for" informing all class members, 42 U.S.C. § 1396a(a)(43)(A); providing or arranging of medical and dental check ups with appropriate elements for all class members, 42 U.S.C. §§ 1396a(a)(43)(B), 1396d(r)(1)(medical check ups), 1396d(r)(3)(dental check ups); and arranging all required treatment allowed by the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(43)(C), 1396d(r)(5), including case management. 42 U.S.C. §§ 1396(a)(19), 1396n(g)(2).

Third, the statute is clear and concrete enough for judicial interpretation and enforcement. The EPSDT provisions are not, as defendants argue, vague or amorphous. Defendants base their argument on *Blessing*, in which plaintiffs sought to enforce a federal child support enforcement statute. 520 U.S. at 333-35. The Court held that relief under § 1983 was not available, first, because plaintiffs had failed to articulate precisely which rights they sought to enforce: their efforts to enforce the entire child support scheme painted

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More broadly, the amendment overrules the general theory in *Suter* that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan. Instead, the Wilder test must be applied to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries. *See, e.g., Doe v. Chiles*, 136 F.3d 709, (11th Cir. 1998). In *Doe*, the Eleventh Circuit held that 42 U.S.C. § 1396a(a)(8), which states that "[a] State plan for medical assistance must . . . provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals," confers a right enforceable under § 1983 to Medicaid eligible participants to be served with "reasonable promptness." 136 F.3d at 719.

with "too broad a brush." *Id.* at 342. Unlike the plaintiffs in *Blessing*, plaintiffs in this case have isolated provisions within the Medicaid Act which are quite clear and concrete. Second, the Court in *Blessing* was reluctant to enforce a statute which required the Secretary of Health and Human Services to "look to the aggregate services provided by the state, not to whether the needs of any particular person have been satisfied," holding instead that a federal provision requiring that states be in "substantial compliance" with the federal child support law only tangentially benefitted the plaintiffs. 520 U.S. at 343. This case, therefore, may be distinguished from *Blessing* in this key respect. Plaintiffs do not seek to enforce a "yardstick" or provision requiring "substantial compliance." They seek to enforce decree provisions based on rights Congress has guaranteed to each and every Medicaid recipient under the age of 21. 42 U.S.C. § 1396a(a)(43).

As defendants stress, the *Blessing* Court held that a sufficient staffing requirement could not be enforced via § 1983 because it gave no guidance as to what level of staffing would be sufficient. 502 U.S. at 345. However, contrary to defendants' characterization of the EPSDT provisions as "standardless promulgation," the provisions in fact go into great detail regarding the timing of specific services that must be provided. *See* 42 U.S.C. § 1396d(r). The EPSDT portions of the Medicaid Act are, therefore, clearly more specific than those at issue in *Blessing*, and certainly more definite than the "reasonable access" provision of the Medicaid Act held enforceable in *Wilder*.

Moreover, as described below, many courts have already found the statutory provisions at issue in this case to be enforceable via § 1983. In *Bond v. Stanton*, 655 F.2d 766, 767-79 (1981) ("*Bond II*"),[192] the State of Indiana did not effectively implement its EPSDT program, failing in particular with regard to its informing and screening components.[193] Section 1983 was available to enjoin this violation of indigent children's federal rights. *Bond II*, 655 F.2d at 768; *Bond I*, 504 F.2d at 1247, 1251. In fact, the court in *Bond I* emphasized the mandatory nature of the EPSDT provisions at issue: "The mandatory obligation upon each participating state to aggressively notify, seek out and screen persons under 21 in order to detect health problems . . . is made unambiguously clear" by the EPSDT statute. *Bond I*, 504 F.2d at 1250; *see also Salazar v. District of Columbia*, 954 F.Supp. 278, 303, 311-12 (D.D.C. 1996); *Wellington v. District of Columbia*, 851 F.Supp. 1, 6 (D.D.C. 1994);[194] *Chappell v. Bradley*, 834 F.Supp. 1030, 1035 (N.D. Ill. 1993).

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192. *See Stanton v. Bond*, 504 F.2d 1246 (7th Cir. 1974), *cert denied*, 420 U.S. 984 (1975) ("*Bond I*") (subsequent history omitted) for a prior decision in *Bond*.

193. *Bond* addressed the predecessor to the current EPSDT statute. These requirements are currently codified in 42 U.S.C. §§ 1396a(a)(43)(A) (informing); 1396a(a)(43)(B) (checkups); 1396d(r)(1)(A) (medical checkups); 1396d(r)(3) (dental checkups). *Bond* relied on federal regulations and guidelines. In many regards, the language of the current statute either follows or parallels the language of the regulations in effect when *Bond* was decided. *See* 45 CFR §§ 205.146 and 205.146(c), *quoted in Bond II*, 655 F.2d at 770; 45 CFR § 249.10(a), *quoted in Bond II*, 655 F.2d at 771; *see also Bond I*, 544 F.2d at 1250.

194. *Salazar* and *Wellington* are different phases of the same case.

Similarly, the Fifth Circuit in *Mitchell v. Johnston*, 701 F.2d 337, 341-42 (5th Cir. 1983) allowed a § 1983 challenge to the state's reductions in EPSDT preventive and treatment dental services. Plaintiffs complained because Texas cut several dental services from its Medicaid program for children. But, since Congress clearly intended to "require participating states to provide eligible children with a comprehensive *preventive* dental program," 701 F.2d at 348 (original emphasis), Texas children who qualified for Medicaid benefits could enforce the EPSDT dental provisions of the federal Medicaid Act through § 1983. *Id.* at 344, 346-51; *see also Chappell*, 834 F.Supp. at 1033-5.

Finally, numerous courts have held that the states' duty to provide a broad scope of treatment services available to EPSDT eligible participants is also an enforceable obligation. That is, defendants must provide to class members any healthcare service that is permissible under the federal Medicaid Act, as long as the service is "necessary . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services. . . ." 42 U.S.C. § 1396d(r)(5). For example, *Pittman by Pope v. Secretary, Florida Department of Health and Rehabilitative Services*, 998 F.2d 887, 889, 891-92 (11th Cir. 1993), holds that 42 U.S.C. § 1396d(r)(5) grants enforceable rights to Medicaid recipients under the age of 21 to the full, broad range of healthcare treatment prescribed by the statute. *See also Miller by Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993) (liver-bowel transplant); *Pereira v. Kozlowski*, 996 F.2d 723, 724-6 (4th Cir. 1993) (heart transplant included in state's "obligation to provide to children under the age of twenty-one all necessary services"); *Hunter v. Chiles*, 944 F.Supp.

914 (S.D. Fla. 1996)(augmentative communicative devices and services); *Montoya v. Johnston*, 654 F.Supp. 511 (W.D.Tex. 1987)(Texas Medicaid program's coverage of liver transplants for children and youth).[195]

To conclude, the above-cited EPSDT sections of Medicaid Act create specific rights — to information, to various detailed screening services, and to follow-up or corrective treatment — which may be enforced by plaintiffs under § 1983. This conclusion was reached in this court's 1994 order but is reiterated today in light of the citation of more recent Supreme Court precedent and defendants' renewed objections.[196] These federal enforceable rights form the bases for the decree provisions which plaintiffs now seek to enforce.

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195. This is not a complete list of the many cases that require state Medicaid programs to cover the full range of services required by 42 U.S.C. § 1396d(r)(5). In this case, the consent decree requires defendants to provide needed case management to class members. As with organ transplants, case management is a service that is permitted by the federal Medicaid Act. 42 U.S.C. §§ 1396(a)(19); 1396n(g)(2). As a result, Defendants must provide it to class members when needed. As the above-cited cases demonstrate, plaintiffs may enforce their rights to this service and others via § 1983.

196. Because defendants do not re-urge their argument concerning the foreclosure by Congress of the use of § 1983 in the pursuit by plaintiffs of their rights under the EPSDT statute, that issue will not be revisited.

Issue II: Eleventh Amendment Objections

A. Defendants' Objection

Defendants present a second challenge to the enforcement of various provisions of the decree based on this court's subject matter jurisdiction. In *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (hereinafter *Firefighters)*, the Supreme Court stated that a consent decree possesses a dual character or "hybrid nature" that reflects attributes of both a contract and a judicial decree. Consent decrees parallel contracts since "their terms are arrived at through mutual agreement of the parties." *Id.* at 519. The judicial aspect of a consent decree derives from the imprimatur of the court, which invests the decree with the integrity of the judiciary and signifies the court's willingness to implement the solution of the parties.

It is a fundamental concept of federal jurisprudence that the Eleventh Amendment to the U.S. Constitution is an explicit jurisdictional limitation on the judicial power of the federal courts. The Supreme Court has interpreted the Eleventh Amendment so as to provide immunity to a state against suits in federal court by a citizen of that state. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984). Defendants therefore argue that the Eleventh Amendment prohibits the enforcement against the State of Texas by this federal court of any decree provision which goes above and beyond what federal EPSDT law requires. This court's holding otherwise, defendants argue, would result in an impermissible infringement on the rights of the

State of Texas.[197] *Saahir v. Estelle*, 47 F.3d 758 (5th Cir. 1995) (per curiam); *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987), *cert. dismissed*, 483 U.S. 1057 (1987) (the only legitimate basis for federal court intervention consistent with the Eleventh Amendment is the vindication of federal rights).[198]

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197. In this case, plaintiffs have availed themselves of the "Ex Parte Young" exception. In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court created an exception to states' Eleventh Amendment Immunity in holding that acts performed by state officials in violation of federal law could not have been authorized by the state, and that, therefore, suits seeking to enjoin such acts are not suits against the state. Consequently, federal courts have authority to enjoin prospectively violations of federal law and require state officials to conform their conduct to federal law. *Edelman v. Jordan*, 415 U.S. 651 (1974). As the Supreme Court reiterated last year, because of *Ex Parte Young*, the Eleventh Amendment "does not bar certain actions against state officers for injunctive or declaratory relief." *Alden v. Maine*, 527 U.S. 706 (1999). In this case, plaintiffs seek injunctive relief against several state officials, including the Commissioner of Health and Human Services, the Commissioner of Health and the Texas State Medicaid director, all sued in their official capacities. Therefore, the case falls squarely within the *Ex Parte Young* exception to the Eleventh Amendment.

198. In their Post-Trial Brief, defendants raised the additional argument that *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000), limit this court's ability to enforce the decree in this matter. However, these cases address the authority of Congress to pass laws conferring rights upon citizens, and are therefore not relevant to this case. It is well-established that Congress may impose requirements for state Medicaid programs because each state may choose whether to accept federal funds to

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Notably, defendants do not argue that the decree was invalid as an agreement between the parties or improperly approved by this court. To the contrary, they note, correctly, that to sustain federal court jurisdiction to approve a consent decree against state officials, the remedies in the decree must only serve to: 1) resolve a dispute within the court's subject matter jurisdiction, 2) come within the general scope of the case made by the pleadings, and 3) further the objectives of the law upon which the complaint was based. *Firefighters* at 525. Notably, a Fifth Circuit panel in *Lelsz* held that although, under *Firefighters*, a federal court may enter a consent decree providing broader relief than the court could have awarded after a trial, the same court "must fall back on its inherent jurisdiction when it issues its own, different order enforcing. . . the decree." *Lelsz*, 807 F.2d at 1252. Thus, defendants rely heavily on the Fifth Circuit's distinction in *Lelsz* between that which a federal court may *approve* in a consent decree and that which the same court may later *enforce*.

Defendants readily admit that some portions of the decree are directly related to the federal statutory scheme for the EPSDT program and to the rights created by Congress, and

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implement the program. *See, e.g., California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Mitchell v. Johnston*, 701 F.2d 337, 340-41 (5th Cir. 1983). Once a state chooses to accept federal Medicaid funds, it must meet all federal requirements that apply. "[S]ince Texas voluntarily and knowingly entered into the cooperative [Medicaid] program, fully aware of its requirements, it must bear the responsibilities and requirements of its participation." *Mitchell*, 701 F.2d at 351.

are therefore enforceable by this court. However, they argue that, in many instances, the decree creates binding obligations that are ungrounded in a federally protected right. For example, while defendants do not deny that class members have the right to certain health services, they argue that plaintiffs have not shown the relationship between outcome measure studies and the services to which plaintiffs are entitled. Defendants' Post-Hearing Brief at 5. Defendants argue that the court cannot enforce those provisions of the decree unrelated to a federally protected right because the entry of a consent decree does not expand the court's inherent jurisdiction, which is cabined by the Eleventh Amendment with respect to state defendants. *Lelsz*, 807 F.2d at 1252. Plaintiffs respond that each provision of the decree that they seek to enforce meets the requirements in the Fifth Circuit for enforcement consistent with the Eleventh Amendment; each such provision, they argue, vindicates actionable federal rights.

B. *Lelsz v. Kavanagh*

Overview

Since defendants' reading of *Lelsz* threatens to nullify entire sections of the decree to which they consented, a closer look at this cardinal case is warranted. *Lelsz* began when a class of mentally retarded patients residing in state institutions filed an action against officials of the Texas Department of Mental Health and Mental Retardation seeking treatment and rehabilitation in the "least restrictive" setting. The litigation resulted in a consent decree agreed to by the parties and approved by the district court. The district court then issued an order enforcing the consent decree requiring the state to

furlough class members from institutional to "community care" centers. On appeal, a Fifth Circuit panel held that the Eleventh Amendment rendered the district court without jurisdiction to enforce the consent decree because the only source of the right to community-based treatment existed in state law, basing its holding on *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"). *Lelsz*, 807 F.2d at 1252-53.

The Holding: A Closer Look

The *Lelsz* panel summarized its holding as follows: "Whether the district court's [order of enforcement] springs from legitimate enforcement of the [consent decree] or as a court-created remedy for its violation is ultimately of no moment if the relief ordered, in effect, requires state officials to comply with state law." *Lelsz*, 807 F.2d at 1247. This statement of the holding makes apparent that the proposition defendants derive from *Lelsz* — that a court may not enforce decree provisions if those provisions fall outside of the court's "inherent jurisdiction" — must be viewed in conjunction with the federalism which permeates *Pennhurst II*. Defendants rely on one sentence in the *Lelsz* decision that draws an apparent distinction between the authority of a court to approve a consent decree and its authority to enforce it. By isolating this single sentence, defendants obscure the context of the decision, which targets the enforcement of *state* laws against *state* actors in *federal* courts:

> Appellees would draw support from [*Firefighters*] for the proposition that "a federal court is not necessarily barred from entering a consent decree

merely because the decree provides broader relief than the court could have awarded after a trial." This argument founders on several grounds. First, appellees interpret [*Firefighters*] far too broadly. For one thing, that case emphasizes that "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction." If the court has no jurisdiction, as a result of the application of the Eleventh Amendment through *Pennhurst II*, [*Firefighters*] does not apply. Additionally, [*Firefighters*] addressed the entry of a consent decree and held that the parties' agreement could result in a decree whose terms would exceed the court's remedial authority under a governing statute. It does not enlarge the court's latitude to issue its own, different order enforcing or modifying the decree, for in that case we presume the court must fall back on its inherent jurisdiction. The Court in [*Firefighters*] cited *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) with approval of the proposition that in modifying a consent decree, the court may not act inconsistently with the underlying statute.

Lelsz, 807 F.2d at 1252 (citations omitted). The sentence in the above passage on which defendants rely, in which the panel holds that *Firefighters* does not "enlarge the court's latitude to issue its own, different order enforcing or modifying the decree," is sandwiched between two important keys to its interpretation. First, the *Lelsz* panel began its task of distinguishing *Firefighters* by noting that if a federal court

lacks subject matter jurisdiction because of *Pennhurst II*, the *Firefighters* standard for the entry of decrees does not apply. From this beginning statement, it is apparent that the *Lelsz* panel was primarily concerned with the inability of a federal court to enforce *state* law against *state* defendants. Next to the panel's strong emphasis on the Eleventh Amendment implications of enforcing provisions built on state law, the panel's subsequent distinction between the approval of and the enforcement of a decree appears as little more than an afterthought. The remainder of the decision in *Lelsz*, and its heavy reliance on *Pennhurst II*, lend further support to the interpretation that the approval/enforcement distinction is mere dicta — or, at the very least, not at all central to the discussion of the state law issues with which the panel was confronted.

The sentence at the close of this passage similarly cabins the meaning of the words on which defendants rely. The phrase, "in modifying a consent decree, the court may not act inconsistently with the underlying statute," again suggests that the *Lelsz* panel was primarily concerned not with the approval/enforcement distinction, but with a district court's ordering a remedy "inconsistent" with underlying federal law. Like the *Lelsz* panel's emphasis on *Pennhurst II* and state law, the panel's intent to limit clearly the scope of the power of the district court is a theme in the opinion which all but eclipses the brief drawing of a distinction between the approval and enforcement of a consent decree: "If, as appellees argue, a federal court may take almost any action against a state to enforce a consent decree so long as it is 'consistent with' the 'spirit' of the applicable constitutional law and the decree itself, there is no limitation on the scope

of the court's power. Lack of restraint on an organ of government (even the judiciary) is the antithesis of law." *Lelsz*, 807 F.2d at 1253. Upon closer examination, however, the *Lelsz* panel's vision of judicial restraint is nothing more than the rule in *Armour* that a court may not, in an order enforcing a decree, go further than the "four corners" of the decree; looking to its "spirit" is impermissible. *Armour*, 402 U.S. at 462. This principle is neither derived from nor furthered by the panel's distinction between the approval of and the enforcement of a decree. Throughout the opinion, this theme is intertwined with the court's focus on *Pennhurst II*, without additional comment on the distinction upon which defendants now base their response.

The Narrowing of Lelsz

This court is not the first to view *Lelsz* in the shadow and wake of *Pennhurst II*. The dissent from the Fifth Circuit's denial of rehearing en banc in *Lelsz* makes clear that the primary issue in the case was whether *Pennhurst II* "addresses [or] changes prior law on the jurisdiction of federal courts to order remedies for federal law violations" or "address[es] federal court jurisdiction to approve an agreed remedy for mixed violations of federal and state law." *Lelsz v. Kavanagh*, 815 F.2d 1034, 1036 (5th Cir. 1987). Further, in *Ibarra v. Texas Employment Commission*, 823 F.2d 873 (5th Cir. 1987), the Fifth Circuit itself characterized the *Lelsz* panel as having "applied *Pennhurst* to vacate a portion of a district court order enforcing a consent decree when the relief provided by that part of the decree was grounded solely in state law." 823 F.2d at 876-77 (citing *Lelsz*, 807 F.2d at 1255). The *Ibarra* court held:

> Assuming without deciding that *Pennhurst* would extend to a federal court order approving a consent decree, we conclude that *Pennhurst* does not apply to the present case because the consent decree is not based on state law. . . . The concerns about state sovereignty and the lack of any federal interests that were critical to *Pennhurst* are not appropriate when, as in this case, the issue is one of interpreting federal law.

Ibarra, 823 F.2d at 877 (citing *Lelsz*, 815 F.2d at 1036).

Along these same lines, *Ibarra* has since been interpreted by other courts as limiting *Lelsz* to the enforcement of consent decrees based on state law. In *Kozlowski v. Coughlin*, 871 F.2d 241 (2nd Cir. 1989), the Second Circuit noted that "the Fifth Circuit has limited [*Lelsz*] to decrees based solely on state law." 871 F.2d at 244, n. 3 (citing *Lelsz*, 824 F.2d at 373; *Ibarra*, 823 F.2d at 876-77). Similarly, in *Duran v. Carruthers*, 678 F.Supp. 839, 850-51 (D.N.M. Feb 11, 1988), it was held that "any implication that the *Lelsz* holding went beyond an application of *Pennhurst* to a consent decree based solely on state law is eliminated dispositively by *Ibarra*." *See also Wyatt v. Rogers*, 956 F.Supp. 1356, 4132, n. 342 (N.D. Ala. 1997) (rejecting argument based on *Lelsz* that court had limited jurisdiction to enforce consent decree as inapposite in a case not involving a decree based on state law); *United States v. State of Michigan*, 62 F.3d 1418 (6th Cir. 1995).

Despite the pronouncements of these courts, defendants rely on *Saahir v. Estelle*, 47 F.3d 758 (5th Cir. 1995) (per curiam), as evidence of the continuing vitality of *Lelsz*

beyond its application to a consent decree based on state law. In *Saahir*, an inmate filed a motion for civil contempt against state prison officials, alleging that the officials had violated a court-approved consent decree by confiscating and not returning his nonreligious tapes. The language of the decree was broad enough to cover all tapes, though Saahir had brought the suit in an effort to vindicate his First Amendment right to practice religion. The Fifth Circuit panel, citing *Lelsz*, held that the enforcement of the provision allowing Saahir to possess nonreligious tapes was not required by any federal or constitutional law, and that the federal court therefore had no jurisdiction to enforce the provision. Said the panel:

> Here, enforcing the provision that allows Sāahir the non-religious tapes would not require the federal court to enforce state law against the State, as there is no state law giving prisoners the right to listen to musical tapes. Thus, *Pennhurst's* central concern of having "a federal court instruct [ ] state officials on how to conform their conduct to state law," *Pennhurst*, 465 U.S. at 106, 104 S.Ct. at 911, is not implicated here. Nonetheless, enforcing the provision would not be required by any federal or constitutional law, as we fail to discern any First Amendment protections except as to the religious tapes. Because "the only legitimate basis for federal court intervention, consistent with the Eleventh Amendment is the vindication of federal rights," *Lelsz*, 807 F.2d at 1252, the federal courts have no jurisdiction to enforce the provision as it relates to the non-religious tapes. Although the State of Texas has

> evidently not legislated on this particular issue, whether a prisoner has a right to listen to musical tapes is an issue that falls in the area of state governance and not that of the federal government. "If a federal court remedy unfounded in federal law intrudes into the governance of matters otherwise presided over by the states, no federal right has been vindicated." *Id.*

Saahir, 47 F.3d at 761. Despite defendants' arguments to the contrary, *Saahir* is easily distinguished from the case at hand. First, whether plaintiffs are entitled to specific services under the federal EPSDT statute is not an "issue that falls in the area of state governance and not that of the federal government." Instead, the decree provisions plaintiffs seek to enforce are clearly related to the federal EPSDT program in a way that nonreligious tapes are not linked to the First Amendment right to practice one's religion. Second, in *Saahir*, poor drafting led to the inclusion of a decree provision that, under the court's broad interpretation, bore *no* relation to federal law. There has been no mistaken inclusion of paragraphs unrelated to the health of the plaintiff class and the goals of the federal EPSDT program in this case. Third, the distinction in *Lelsz* between what a court may approve and what may be enforced was not, in the view of this court, central to the *Saahir* court's decision, because the provision at issue would not have passed the *Firefighters* test for approval had it been read at the time of entry to include nonreligious tapes. That is, the court might just have easily held, without reliance on *Lelsz*, that the approval of a provision arguably broad enough to cover non-religious tapes was invalidly entered, for it neither came "within the general

scope of the case made by the pleadings" not "further[ed] the objectives of the law upon which the complaint was based." *Firefighters*, 478 U.S. at 525. These factors suggest that one should read *Saahir* as somewhat of an outlier case (confined to its rather odd set of facts) and caution against viewing the case as an extension or broadening *of Lelsz*. For these reasons, it is held that the restrictive language of *Lelsz*, appropriately narrowed to situations involving the enforcement of state law provisions by the several above-cited authorities, should not apply here, despite its apparent resurgence in *Saahir*.[199]

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199. Parenthetically, it is noted that even when both *Lelsz* and *Saahir* are given the broadest of interpretations — their holdings not narrowed to their contexts, as in the above analysis — the rule that a court "must fall back on its inherent jurisdiction" in enforcing a consent decree says very little about which of the many decree provisions in the instant case may be enforced. The *Lelsz* and *Saahir* panels were confronted with decree provisions which were found to be wholly unrelated to federal law. Thus, while these cases make clear that the scope of a consent decree does not enlarge the jurisdiction of a federal court, neither case sets out a standard for how related or linked a provision must be to a federal claim over which a court *does* have subject matter jurisdiction. Certainly the "inherent jurisdiction" on which the court must now "fall back," under *Lelsz*, would permit the enforcement of a decree that includes more than the mere recitation of federal law, as "almost any affirmative decree beyond a directive to obey [federal law] necessarily does that." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992). For this reason, *Lelsz* and *Saahir* are uninstructive in a case involving a decree which does not implicate state law and which obviously has its roots in federal law.

An Untenable Distinction?

Finally, it is noted that, while the distinction between a federal court's jurisdiction to approve of terms in a decree and its jurisdiction to enforce those provisions persists in the Fifth Circuit (albeit in rare instances and in narrow form), more than one judicial mind has found the distinction utterly indefensible. For example, the Second Circuit held in *Kozlowski, supra*, that "the *Firefighters* opinion is consistent with the dictates of the Supreme Court's Eleventh Amendment jurisprudence, and the [*Lelsz*] distinction is untenable. If a federal court can validly enter a consent decree, it can surely enforce that decree." 871 F.2d at 244. The Tenth and Seventh Circuits have likewise adopted this standard. *Duran v. Carruthers*, 885 F.2d 1485 (10th Cir. 1989); *Komyatti v. Bayh*, 96 F.3d 955 (7th Cir. 1996). Similarly, the dissenters from the Fifth Circuit's denial of rehearing *of Lelsz* en banc agreed with the Second, Seventh and Tenth Circuits in this regard:

> There can be no doubt that a federal court, to remedy federal violations, may require state officers to adopt programs that, absent the federal violations, were not guaranteed to the plaintiffs by the Constitution or federal statute. The remedial program need only be tailored to cure the condition that offends federal law. *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). If the parties do not choose to proceed to trial, the court may, with their agreement, enter a consent decree that provides relief greater than

> the court might have awarded after trial. *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). The panel opinion is inconsistent with that clearly established law.

815 F.2d at 1037 (dissent from denial of rehearing en banc by Reavley, Circuit Judge, with whom Clark, Chief Judge, Rubin, Politz, Randall, Johnson, and Williams joined).[200] In addition, it is noted notes that the principles of comity and federalism are furthered when state defendants draft their own documents setting out the means by which they will come into compliance with federal law. To the extent such documents are later held unenforceable by federal courts, the incentives for plaintiffs to enter into such voluntary agreements with defendants are lessened if not wholly removed.

Indeed, the positive policy implications of limiting this distinction are obvious: "Having entered into the consent decree rather than bringing the dispute . . . to trial, [the defendant] cannot now evade an integral portion of that decree on the ground that it was not directly tied to a federal claim." *Kozlowski*, 871 F.2d at 245 (quoting *Kozlowski*, 711 F.Supp. 83, 87 (S.D.N.Y. 1988)). Such an outcome would

200. *See also* Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum.L.Rev. 1796, 1812 ("While there is still much uncertainty about the proper relationship of federal consent decrees to state sovereign immunity, it seems clear that the federalism protections of the eleventh amendment, like those of the article III 'case or controversy' requirement, are considerably less embracing here than in the context of ordinary federal equitable relief." (footnotes omitted)).

detract from the integrity of the court by allowing state defendants to avoid bargained-for obligations while receiving the benefit of escaping litigation and potential liability. The parties' intent would also be ignored in such a scheme, and the finality of parties' voluntary agreements significantly undermined. Obviously, such decree nullification would leave little incentive for future parties to enter into voluntary agreements, which avoid often protracted and time-consuming litigation.[201] The Supreme Court has since reaffirmed this logic in the context of the modification of consent decrees based on constitutional claims:

> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. [Such a holding] "would necessarily imply that the only legally enforceable obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements."

201. Additionally, if judicial precedent renders the line between what is within the jurisdiction of a federal court and what is not becomes more difficult to discern, parties contemplating entering into consent decrees will be even more unsure about their future ability to enforce decree provisions. This uncertainty will further undermine parties' incentives to bind themselves by such agreements.

Rufo, 502 U.S. at 389-90 (quoting *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991)).

In sum, the distinction in *Lelsz* between the approval of and enforcement of decree provisions has been confined by several authorities to situations involving consent decrees based on state law. Moreover, the distinction as it was originally drawn had little repercussion for the actual holding or logic in *Lelsz*, and was not necessary to the holding in *Saahir*. Because of the narrowing of the *Lelsz* distinction discussed above, defendants' invitation to extend the distinction to this case, in which the decree provisions at issue bear a clear relationship to federal law is declined. Furthermore, the reasoning of the dissenters from the denial of rehearing en banc in *Lelsz*, the subsequent explicit rejection of the *Lelsz* distinction by three Circuit Courts of Appeals, and the strong policy-based arguments briefly outlined above, all caution against the extension of the *Lelsz* distinction to this matter.

C. Application

In accordance with the above analysis, the *Firefighters* test will be applied to the decree provisions sought to be enforced by plaintiffs.[202] As was held above in Part Two,

202. The reasons for this court's decision to apply the *Firefighters* standard have been made abundantly clear. During the course of this hearing, defendants have urged the court to adopt various tests in determining whether or not the various decree provisions, all of which bear some relationship to plaintiffs' federally protected rights, are enforceable. Defendants' Post-Trial Brief at 13 (Cont'd)

Section I, plaintiffs possess rights under the EPSDT statute that are enforceable through § 1983. These rights include the right to be informed of the program, the right to the provision of or arrangement for the provision of screening services, and the right to the arrangement for corrective treatment. Plaintiffs also possess rights to regular medical and dental checkups, and rights to the full range of healthcare services allowed by the federal Medicaid statute, including but not limited to case management. After a careful and thorough review of the decree provisions sought to be enforced by plaintiffs, it is found that each provision falls squarely within the parameters outlined in *Firefighters*, and therefore may be enforced against defendants. Because the provisions sought to be enforced are many, *see* Part One, *supra*, the court's application of the *Firefighters* standard will

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(provisions must "seek to vindicate federally protected rights"), at 27 (provisions must "seek to protect rights created by the EPSDT legislation"); Defendants' Brief in Response to Plaintiffs' Brief in Support of this Courts Jurisdiction to Enforce Consent Decree at 5 (provisions must "directly vindicate an enforceable federal right"), at 7 (provisions must "be closely related to the federal right"); Defendants' Post-Trial Brief at 28 (provisions must be actual requirements of federal law or, alternatively, must have been violated by defendants so as to have "resulted in class members being deprived of specific entitlements or federally protected rights created by the statute"). Because the *Firefighters* standard will be applied by the court for the reasons listed above, defendants' proposed alternative standards will not be fully discussed or applied. However, it is found that, were it the case that only those decree provisions "closely related to" or "directly vindicating" plaintiffs' federal rights were enforceable by this court, this standard would also permit the enforcement of each of the provisions found to have been violated by defendants.

not be spelled out in detail with respect to every provision. Instead, each of defendant's objections to the enforcement of various provisions will be considered individually.[203] Only

203. Before directing its attention toward defendant's objections to the enforcement of specific provisions of the decree, this court notes its strong agreement with the reasoning in *Komyatti v. Bayh*, 96 F.3d 955, 956 (7th Cir. 1996), regarding the appropriate course for a defendant seeking to avoid the enforcement of a consent decree:

> [W]e believe that the court expressed the usual course in *Kindred* when it wrote that a "continuing respect for the valid decrees of a court commands that they be obeyed until changed." 9 F.3d at 644. Such an approach is certainly compatible with the traditional approach of our law. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439-40, 96 S.Ct. 2697, 2706-07, 49 L.Ed.2d 599 (1976); *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). Such an approach is also, we are pleased to say, most compatible with the traditions of our people and their commitment to a rule of law.

Id. at 963 (footnote omitted). It is acknowledged that the Fifth Circuit permitted a party to be excused, without having made a motion to modify, from a decree obligation which bore no resemblance to any requirement of federal law. *Saahir v. Estelle*, 47 F.3d 758 (5th Cir. 1995). Nonetheless, in cases like this one, in which the court's jurisdiction to enforce particular provisions of the decree is somewhat difficult to ascertain because of the obvious relationship of each provision to federal law, a motion to modify seems most warranted. Otherwise, state officials may be tempted to ignore decree provisions where plaintiffs' ability to enforce them in the future remains unclear. While the defendants in this case have not shown such utter disregard for the order of a federal district court, it would make sense, generally

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those objections to paragraphs which defendants were found in Part One to have violated will be given attention below. Paragraphs which defendants are found to have violated in Part One but are not discussed below in relation to defendants' objections are found by the court to be enforceable under the application of this test.

Enforcement of Provisions Guaranteeing Services

Outreach

Defendants challenge, first, this court's ability to enforce the outreach provisions of the decree, discussed at length in Part One, Section I. Defendants assert that plaintiffs' reliance on the term "effective," as that term appears in the decree, contradicts HCFA's definition of the term, therefore materially altering the requirements of federal law. Specifically, defendants point to 42 C.F.R. § 441.56(a), which states that a state agency must provide for a combination of written and oral methods "designed to inform effectively." Defendants argue that this regulation should guide the court in ascertaining the parameters of the duty to conduct outreach under federal law. "The duty to effectively inform all persons in the state is a much greater burden," defendants note, "than is the duty to provide a method designed to effectively inform." Defendants' Post-Trial Brief at 24. The court is in

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speaking, to create a legal framework in which a defendant seeking to avoid a decree obligation is required to seek an alteration of the decree from the district court. However, in light of *Saahir*, the requirement of filing a motion to modify will not be imposed on defendants in this case without further direction from the Fifth Circuit.

agreement with defendants that, in fact, the duty to inform all eligible participants for the program is a much greater task than is the duty to design a method to do so. However, the duty under federal law is unequivocally the duty to "inform[] all persons" eligible for EPSDT about their rights to services. 42 U.S.C. § 1396a(a)(43)(A). However, defendants' argument fails for two reasons. First, as was explained in Part One, Section I, the isolated use of the word "effective" in a single regulation is not particularly probative of the parties' intended meaning of the term "effective" as used in the decree. This is made obvious by the parties' repeated use of the word in conjunction with defendants' outreach duties without the use of the modifying phrase "designed to."

Second, the court having interpreted the phrase "effectively inform" within the four corners of the decree in Part One, Section I(C), the only remaining question is, may the court enforce the provision as it has been interpreted? To answer that question, the court looks not to an isolated regulation involving one aspect of the duty to inform, but instead to the federal statute itself, which unequivocally requires defendants to "inform [] all persons" eligible for EPSDT about their rights to services. 42 U.S.C. § 1396a(a)(43)(A). Decree provisions which obligate defendants to inform "effectively," as this court has interpreted the term, clearly serve to resolve a dispute within the court's jurisdiction, come within the general scope of the case made by the pleadings, and further the objectives of this statutory provision. Put simply, if plaintiffs have an enforceable right to be informed, decree

provisions requiring defendants to inform them effectively clearly vindicate that right. Therefore, paragraphs 32[204] and 52 of the decree are held to be enforceable.

Services

Defendants next object to the enforcement of the decree's provisions concerning the provision of medical and dental[205] checkups and case management. With respect to these provisions, defendants argue that federal law merely requires the provision of these services upon request. This objection is discussed at length in Part One, Section II of this Memorandum Opinion, where it is held that the "request"

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204. The sufficient staffing requirement in paragraph 32, which facilitate the effective informing of the plaintiff class, is similarly held to vindicate class members' right to be informed, and passes the *Firefighters* test cited above.

205. With respect to dental checkups, defendants launch an independent objection to the enforcement of paragraph 143, which obligates defendants to provide periodic dental check ups to plaintiffs. Defendants note that the federal statute entitles plaintiffs to dental "services," and not "checkups." However, federal law also states that "dental services . . . shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health." 42 U.S.C. § 1396d(r)(3)(B). Further, dental services must be provided at "intervals which meet reasonable standards of dental practice . . . and at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition." 42 U.S.C. § 1396d(r)(4)(A). It is held that paragraph 143's mandate that dental checkups be provided quite obviously meets the first two of the *Firefighters* requirements, and clearly furthers the objectives of the law, which include the "maintenance of dental health" through treatment provided at regular "intervals." The term "checkup" is mere shorthand for these federal requirements.

language appearing in the federal EPSDT statute must be read to require the provision of services only upon requests made by those who have first been informed. It is found that the decree provisions requiring the provision of these services serve to resolve a dispute within the court's jurisdiction, come within the general scope of the case made by the pleadings, and further the objectives of the law upon which the complaint was based. Indeed, these provisions are no more than restatements of the requirements of federal law. 42 U.S.C. § 1396a(a)(43). More specifically, this court's interpretation of those provisions — namely, that defendants may be held in violation of decree requirements regarding the provision of services upon request where they have failed to provide class members with the information necessary to make such requests — may be enforced as entirely consistent with the history, text, and structure of the federal EPSDT statute. *See* Part One, Section II, *supra*. Therefore, paragraphs 2, 3, 212,[206] and 143 are held to be enforceable by this court. Defendants launch a similar objection to the enforcement of the decree's case management provisions. For the reasons given above, paragraphs 248 and 264[207] are also held to be enforceable by the court.

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206. Defendants launch an independent objection to the enforcement of paragraph 212, arguing that its focus on abused and neglected class members has no basis in federal law. Because this paragraph does no more than state defendant's general duty under federal law with respect to a subgroup of the class, defendant's objection will be denied.

207. Paragraph 264 also clearly passes the *Firefighters* test because, under 42 U.S.C. § 1396a(a)(1), each state's plan must provide that the EPSDT program be in effect in all political subdivisions of the state.

Managed Care

Defendants object to the enforcement of decree provisions obligating defendants to provide checkups and other services to class members who are enrolled in managed care. Defendants note that 42 U.S.C. § 1396u-2 gives states the option to use managed care and to require an individual who is eligible for medical assistance under a state plan to enroll with a managed care entity as a condition of receiving assistance. That section also requires managed care organizations (MCOs) to provide assurances to the state and to the Secretary that the appropriate range of services and access to preventive and primary care services for the population enrolled in the service area is being offered. The provision also requires that MCOs maintain a sufficient number, mix and geographic distribution of providers of services. Defendants stress that under § 1396u-2, each MCO is required to "offer" services, and is not expressly required to assure the receipt of such services. Defendants appear to argue that this should affect the court's ability to enforce the managed care provisions of the decree, discussed at length, *supra*, at Part One, Section IV.

This argument wholly misses the mark. Section 1396u-2 permits the states to utilize managed care to meet their obligations under the federal EPSDT statute; it does not free them from those obligations, or limit their responsibilities to managed care enrollees. Paragraphs 190 and 192 of the decree merely extend defendants' obligations under the EPSDT statute to class members enrolled in managed care, giving special emphasis to their entitlements in light of the potential problems posed by the implementation of managed

care.[208] Moreover, the findings of fact in relation to this subgroup, *see* Part One, Section IV(B), clearly demonstrate that special provisions underlining defendants' obligations to managed care enrollees are necessary to ensure defendant's compliance with 42 U.S.C. 1396a(a)(43). In sum, paragraphs 190 and 192 do not "go beyond" § 1396u-2, as defendants argue; they merely dictate that defendants must comply with federal EPSDT law with respect to managed care enrollees. Thus, these paragraphs quite obviously serve to resolve a dispute within the court's jurisdiction, come within the general scope of the case made by the pleadings, and further the objectives of the law upon which the complaint was based. Paragraphs 190 and 192 are therefore held to be enforceable by the court.

Along these same lines, defendants argue that because 42 U.S.C. 1396(c)(1)(A)(i) requires a state implementing managed care to develop and implement access standards, paragraphs 190 and 192 go beyond the requirements of federal law. However, as stated above, the managed care paragraphs go no further than to assure defendants' compliance with the EPSDT statute, which requires them to

208. The portions of paragraphs 190 and 192 relevant to this discussion are those which defendants were found to have violated in Part I, Section IV. Paragraph 190 mandates that class members in managed care are "entitled to timely receipt of the full range of EPSDT services, including but not limited to medical and dental checkups." The pertinent portion of paragraph 192 is its requirement that defendants "assure medical and dental checkups in a timely manner to all [managed care] recipients." *See also* paragraph 266, which states that "[a]ll EPSDT recipients, including those in managed care, are entitled to the full range of case management assistance when medically needed."

inform and provide services to all members of the EPSDT population, including those in managed care. Additional federal provisions relating to the implementation of managed care do not limit defendants' duties under 42 U.S.C. § 1396a(a)(43). Such provisions further regulate the implementation of managed care.

Defendants also maintain that an additional provision of paragraph 192, which requires defendants to assure that managed care organizations have the capacity to accelerate services to the children of migrant farmworkers to accommodate their special circumstances, has no basis in federal law. It is recognized that the words "farmworkers" and "acceleration" do not appear in the federal EPSDT statute or accompanying regulations. However, as Part One, Section IV(D) aptly demonstrates, this subclass of EPSDT eligible participants do not receive the information or services to which they are entitled without such acceleration. Defendants have a duty under 42 U.S.C. § 1396 to inform "all" EPSDT eligible participants about the program and to provide services to those who request them after having been informed. *See* Part One, Section II(C). Paragraph 192 requires acceleration because it is a necessary step in fulfilling the duty to inform and serve a population that migrates quickly and is unreachable for long durations of time. *See* Part One, Section IV(D). This requirement, which clearly vindicates the rights of this subset of the class, serves to resolve a dispute within the court's jurisdiction, comes within the general scope of the case made by the pleadings, and furthers the objectives of 42 U.S.C. § 1396a(a)(43). Therefore, the farmworker acceleration requirement in paragraph 192 will be enforced by the court.

Appendix D

Enforcement of Provisions Requiring Reporting of Data and Information

Reporting

Defendants make numerous objections to the various decree paragraphs requiring the furnishing of information to plaintiffs.

Defendants first object that the decree's requirement (in paragraphs 284 and 191) that defendants report the number of eligible participants who have received checkups is unenforceable because the Health Care Finance Administration (HCFA) does not so require. HCFA Form 416, which is used by HCFA to assess the effectiveness of state EPSDT programs, requires states to report only the number of eligible participants receiving any dental service, the number of eligible participants receiving preventive dental services, and the number of eligible participants receiving dental treatments. Defendants argue that plaintiffs have "made no showing that their claim regarding the reported percentages of dental checkups as compared to medical checkups is at all related to a federally protected right to the receipt of dental services upon request." Defendants' Post-Trial Brief at 17. The court is well aware that HCFA does not require the reporting of the receipt of checkups. However, it is held that the decree's reporting requirements quite clearly served to resolve a dispute within the court's jurisdiction and come within the general scope of this case. It is further held that the collection of data furthers the objectives of the EPSDT statute, which is to improve the health of poor children. That objective cannot be accomplished without constant and

Appendix D

rigorous review of the program's accomplishments and shortcomings. Therefore, paragraph 284 will be enforced by this court.

A similar conclusion must be reached with regard to defendants' challenge to the decree's reporting requirements concerning managed care enrollees. Although HCFA does not require the data required by the decree about the receipt of care by eligible participants enrolled in managed care, it is unquestionable that the *Firefighters* standard has been met with regard to this reporting provision. Therefore, paragraph 191 will be enforced by this court.

Defendants next object to the reporting requirements for teens and for abused and neglected class members, asserting that neither federal law nor regulations impose any distinct screening performance standards on the state with respect to any sub-groups in the EPSDT population. Again, while HCFA may not require such detailed reporting, reporting on defendants' compliance with federal law with respect to these at-risk subgroups clearly served to resolve a dispute within the court's jurisdiction, comes within the general scope of the case made by the pleadings, and furthers the objectives of the law upon which the complaint was based. Therefore, paragraph 212 will be enforced by the court.

Additionally, the decree requires defendants to provide plaintiffs with the number of class members who get medical or dental checkups in each county or cluster of sparsely populated counties. This requirement also clearly passes the *Firefighters* test, as 42 U.S.C. § 1396a(a)(1) requires that each state's plan provide that the EPSDT program be in effect

in all political subdivisions of the state. Given this provision, the "statewideness" reporting provisions of the decree in paragraphs 273 through 281 are held to be enforceable.

Outcome Measures and Corrective Action Plans

Defendants next object to the decree's requirement that they provide certain outcome measures. *See* Part One, Section VII. The agreed-upon outcome measures, which assess the health of the EPSDT population, include immunization rates among subpopulations of the class, lead poisoning levels among class members, asthma hospitalization rates, and the mental health of the population. Again, these are not explicitly required by federal law. However, these indicators of the health of the plaintiff class were created by the parties to gauge the success of the EPSDT program and the widespread receipt of particular services. Therefore, like the other reporting requirements discussed above, the outcome measures clearly fall within the scope of this case, and further the objective of the EPSDT program by informing both parties as to the recipients' health needs and progress. Paragraphs 289, 293, 295, and 296 are therefore enforceable by the court.

Next, defendants challenge the requirement that they create corrective action plans to address the needs of "lagging" counties. *See* Part One, Section III. Defendants assert that they need not "have every class member with a need serviced," as this would be "impossible." Defendants' Post-Trial Brief at 20. The court is in agreement with this statement, and has found defendants in violation not for failing to service every child with a health need, but for failing to meet the requirements of 42 U.S.C. § 1396a(a)(43),

based on the overwhelming evidence cited in Part One. The requirement that defendants address the needs of "lagging" counties, however, is supported not only by 42 U.S.C. § 1396a(a)(43), which requires the informing and subsequent servicing upon request of "all" eligible participants, but also by § 1396a(a)(1), which imposes a "statewideness" requirement upon participating states. It is found that the requirement that defendants create corrective action plans to address their failures in regions where the performance of the EPSDT program is particularly dismal is enforceable by plaintiffs. The provision clearly vindicates the rights of plaintiffs to receive services to which they are entitled and passes the *Firefighters* test. The corrective action requirements in paragraphs 273 through 281 are therefore enforceable by the court.[209]

Enforcement of Training and Toll-free Line Provisions

The decree's training provisions — both those relating to the training of managed care personnel and those covering the training of providers and others outside of the managed care system — will also be held enforceable by plaintiffs. Training, defendants correctly argue, is not a requirement of

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209. Although defendants do not specifically object to the corrective action requirement for the medical transportation program, it is found that the requirement that defendants continually re-assess the means by which they arrange and provide healthcare is also enforceable because it is one means by which the state may meet its obligations under 42 U.S.C. § 1396(B) and (C). Thus, the corrective action plan provision serves to vindicate plaintiffs' rights to such arrangement and provision of services. It also clearly passes the *Firefighters* test. Paragraphs 223 through 229 are therefore held to be enforceable.

federal law. However, both common sense and plaintiffs' evidence aptly demonstrate the causal connection between the increased knowledge of providers and other personnel and the access to and receipt of services by the plaintiff class. Training personnel clearly vindicates the rights of the plaintiffs to information and services. Only those who are trained can impart correct knowledge, and only with knowledge may plaintiffs make requests. Moreover, the provisions most certainly served to resolve this dispute, and they come within the general scope of the case made by the pleadings. Finally, training providers about EPSDT clearly furthers the objectives of the EPSDT statute. For these reasons, the court may enforce paragraphs 107, 108, 112, 113, 114, 117-120, 124-130, and 194.

Defendants also object to the toll-free line provisions of the decree, noting correctly that no such lines are required by federal law or regulation. However, defendants are under a clear statutory mandate to "provide or arrange for" services upon request. 42 U.S.C. § 1396. For program eligible participants, who are often without home phones or transportation, the toll-free lines are crucial to the coordination of and receipt of healthcare. *See* Part One, Section V(A). The requirement that defendants answer toll-free lines promptly and helpfully directly vindicates the rights of plaintiffs to information, to receive services "upon requests" (which are most frequently made by class members who cannot afford to pay a toll), and to have services "provided" and "arranged for." 42 U.S.C. § 1396a(a)(43). It is further found that the requirement serves to resolve this dispute, and comes within the general scope of the case made by the pleadings. Last, it is found that because the toll-free lines function as the

defendants' primary means of fulfilling their duty to provide or arrange services, paragraph 247 unequivocally furthers the objectives of the EPSDT statute. Paragraph 247 will therefore be enforced by the court.

Conclusion

The court compliments both parties in their diligent efforts to present abundant evidence to the court regarding the merits of this motion to enforce the decree, and further compliments the efforts of both parties to meet the health needs of disadvantaged children in this state.

Based on the above findings of fact and conclusions of law, defendants are hereby

FOUND to have violated certain provisions of this court's decree in this matter, as detailed in Part One of this Memorandum Opinion. It is further

FOUND that the decree is enforceable to the extent outlined above, in Part Two of this Memorandum Opinion.

SIGNED this 9th day of August, 2000.

s/ William Wayne Justice
William Wayne Justice
Senior United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

Civil Action No. 3:93CA65

LINDA FREW, ET AL.,

Plaintiffs,

v.

DON GILBERT, ET AL.,

Defendants

ORDER

From March 13 to March 17, 2000, a hearing was held on plaintiffs' motion to enforce the consent decree in the above-entitled and numbered civil action. The defendants having been found to have violated the decree, an order of enforcement must be issued to ensure their future compliance. Accordingly, the court's "inherent equitable powers may be used to achieve fair remedial results." *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir.), *cert denied*, 464 U.S. 874 (1983), *modified*, 625 F.Supp. 564 (W.D.N.C. 1985). It is "particularly apt" for the court to require "relatively mild remedies as a first resort. . . . The possibility of more drastic remedies should be held in abeyance." *United States v. United Shoe Machinery Corporation*, 391 U.S. 244, 249-50 (1968) (citation omitted). At the same time, a district court should

Appendix D

be "intimately involved in a consent decree, standing behind the decree, ready to interpret and enforce its provisions." *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995) (citation omitted). Therefore, it is hereby

ORDERED that defendants shall mail to the court and opposing counsel, within sixty days of the issuance of this order, proposed corrective action plans to remedy each violation of the decree detailed in Part One of this court's Memorandum Opinion. For each violation, defendants' corrective action plan shall propose time frames in which defendants will make timely efforts to comply with the decree. Defendants' plans shall also propose methods to report defendants' compliance efforts to the court and to plaintiffs' counsel. Defendants are encouraged to present their proposals to plaintiffs' counsel before submitting them to the court. It is sincerely hoped that the parties will be able to present agreed proposals to the court regarding many of the disputed issues in this case. It is further

ORDERED that, after defendants have submitted their proposals, plaintiffs may present their comments, if any, to the court and opposing counsel within thirty days of their receipt of defendants' corrective action plans. In addition, plaintiffs may submit their own proposed corrective action plans by the aforementioned date. It is further

ORDERED that, within fifteen business days of plaintiffs' submission of comments or alternative plans, the parties shall meet to discuss the proposals and to determine if they can jointly suggest corrective action plans to the court. The parties shall report to the court about the results of their discussion(s)

within fifteen days of the termination of the initial fifteen-day meeting period. The parties are encouraged to meet more than once if such additional meetings will facilitate the parties agreement on a jointly-proposed remedial order.

SIGNED this 9th day of August, 2000.

s/ William Wayne Justice
William Wayne Justice
Senior United States District Judge

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XI—Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States.

Appendix E

42 U.S.C. § 1396a

* * *

(43) provide for—

(A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases,

(B) providing or arranging for the provision of such screening services in all cases where they are requested,

(C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and

(D) reporting to the Secretary (in a uniform form and manner established by the Secretary, by age group and by basis of eligibility for medical assistance, and by not later than April 1 after the end of each fiscal year, beginning with fiscal year 1990) the following information relating to early

Appendix E

and periodic screening, diagnostic, and treatment services provided under the plan during each fiscal year:

(i) the number of children provided child health screening services,

(ii) the number of children referred for corrective treatment (the need for which is disclosed by such child health screening services),

(iii) the number of children receiving dental services, and

(iv) the State's results in attaining the participation goals set for the State under section 1396d(r) of this title.

* * * *

Appendix E

42 U.S.C. § 1396d

* * *

(r) Early and periodic screening, diagnostic, and treatment services

The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:

(1) Screening services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and

Appendix E

(B) which shall at a minimum include—

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

(iii) appropriate immunizations (according to the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines) according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance).

(2) Vision services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in vision, including eyeglasses.

(3) Dental services—

(A) which are provided—

(i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in hearing, including hearing aids.

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

Appendix E

Nothing in this subchapter shall be construed as limiting providers of early and periodic screening, diagnostic, and treatment services to providers who are qualified to provide all of the items and services described in the previous sentence or as preventing a provider that is qualified under the plan to furnish one or more (but not all) of such items or services from being qualified to provide such items and services as part of early and periodic screening, diagnostic, and treatment services. The Secretary shall, not later than July 1, 1990, and every 12 months thereafter, develop and set annual participation goals for each State for participation of individuals who are covered under the State plan under this subchapter in early and periodic screening, diagnostic, and treatment services.

* * * *

Appendix E

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F — CONSENT DECREE OF PARTIES FILED FEBRUARY 20, 1996

[Omitted here but submitted separately as Lodging]

(2)

Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-628

In the Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, *ET AL.*,
Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES

On January 6, 2003, Albert Hawkins became the Commissioner of the Texas Health and Human Services Commission, taking the place of Don Gilbert, who was named in the petition. Accordingly, respondents have substituted Commissioner Hawkins for former Commissioner Gilbert in the caption of this case. *See* SUP. CT. R. 35.3(3).

TABLE OF CONTENTS

List of Parties i

Table of Contents ii

Table of Authorities iv

Brief in Opposition 1

Statement of the Case 1

Summary of Argument 4

Reasons to Deny the Petition 5

I. Because the Waiver-of-Immunity Issue Was Interjected at the Eleventh Hour, and Because the Petition Includes A Different Waiver Question Than That Presented Below, This Case Is an Inappropriate Candidate for Review 5

A. Petitioners Inadequately Pressed the Issue of Waiver of Sovereign Immunity Below by Raising the Issue for the First Time After Briefing in the Court of Appeals 5

B. This Case Does Not Implicate a Circuit Split on the Issue of Waiver That Warrants the Court's Review 8

C. No Waiver of Eleventh Amendment Immunity Occurred in This Case 11

II. No Statutory Issues Warrant the Court's Review 13

A. The Fifth Circuit Properly Decided That the Eleventh Amendment Limits a District Court's Consent-Decree Jurisdiction to Enforcement of Federal Rights 13

B. This Case Presents No Question of EPSDT Rights That Warrants the Court's Review 15

III. Alternative Grounds for Affirmance Make this Case an Inappropriate Candidate for Review 18

Conclusion 19

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 8

Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, (1951) 15

Blessing v. Freestone, 520 U.S. 329 (1997) 8, 16, 17, 18

Blum v. Bacon, 457 U.S. 132 (1982) 18

Boag v. MacDougall, 454 U.S. 364 (1982) 17

Bragdon v. Abbott, 524 U.S. 624 (1998) 8

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 11, 12

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) 18

Demarest v. Manspeaker, 498 U.S. 184 (1991) 8

Duignan v. United States, 274 U.S. 195 (1927) 8

Edelman v. Jordan, 415 U.S. 651 (1974) 12

Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186 (CA10 1998) 10

Estes v. Wyo. Dep't of Transp., 302 F.3d 1200 (CA10 2002) 12

Evans v. City of Chicago, 10 F.3d 474 (CA7 1993) 14

Evergreen v. Hood, 235 F.2d 908 (CA5 2000) 16

Ex parte Young, 209 U.S. 123 (1908) 3, 4, 15

Firefighters v. City of Cleveland, 478 U.S. 501 (1986) ... 13, 14

Garrity v. Sununu, 752 F.2d 727 (CA1 1984) 9

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 16, 17

Granfinanciera v. Nordberg, 492 U.S. 33 (1989) 8

Gunter v. Atl. Coast Line R. Co., 200 U.S. 273 (1906) 10

Hook v. Ariz. Dep't of Corr., 972 F.2d 1012 (CA9 1992) 8, 9

In re Gosselin, 276 F.3d 70 (CA1 2002) 6

In re Hood, No. 01-5769, 2003 WL 21496, at *3 (CA6 Feb. 3, 2003) 6

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 14, 15

Johns v. Stewart, 57 F.3d 1544 (CA10 1995) 10

Komyatti v. Bayh, 96 F.3d 955 (CA7 1996) 8, 13

Kozlowski v. Coughlin, 871 F.2d 241 (CA2 1989) 9, 10, 14

Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 122 S.Ct. 1640 (2002) ... 6, 10, 11, 12

Lytle v. Household Mfg., 494 U.S. 545 (1990) 8

Martinez v. Tex. Dep't of Crim. Justice, 300 F.3d 567 (CA5 2002) 6

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 8

Meyer v. Holley, No. 01-1120, 2003 WL 141310 (Jan. 22, 2003) 8

Mitchell v. Comm'n on Adult Entm't Establishments, 12 F.3d 406 (CA3 1993) 9

Mitchell v. Johnston, 701 F.2d 337 (5th Cir. 1983) 16

N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 727 F.2d 240 (CA2 1984) 9, 10

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 11, 12, 15

Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318 (CA5 2002) 6

Power v. Summers, 226 F.3d 815 (CA7 2000) 6

R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (CA1 2002) 6, 12

Saahir v. Estelle, 47 F.3d 758 (CA5 1995) 10

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 7

Stanton v. Bond, 504 F.2d 1246 (CA7 1974) 17

Sweeton v. Brown, 27 F.3d 1162 (CA6 199) 14

United States v. United Foods, Inc., 533 U.S. 405 (2001) 8

Vecchione v. Wohlgemuth, 558 F.2d 150 (CA3 1977) 9

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 122 S.Ct. 1753 (2002) 15

Washington v. Penwell, 700 F.2d 570 (CA9 1983) 14

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 18

Watters v. Wash. Metro. Area Transit Auth., 295 F.3d 36 (D.C. Cir. 2002) *pet. for cert. filed*, 71 U.S.L.W. 3476 (U.S. Nov. 4, 2002) (No. 02-1034) 6, 12

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) 16, 17

Statutes, Rules, and Constitutional Provisions

42 U.S.C. §1396a(a)(43) 17

42 U.S.C. §1396a(a)(43)(B) 16

42 U.S.C. §1983 ..... 2, 4

SUP. CT. R. 10(a) 1, 4

SUP. CT. R. 10(c) 1, 4

SUP. CT. R. 35.3(3) 6

BRIEF IN OPPOSITION

The Court should deny the petition for certiorari because it does not present an important or unsettled question of federal law over which the courts of appeals conflict. *See* SUP. CT. R. 10(a), (c). The Fifth Circuit correctly held that the district court lacked jurisdiction to order state officials charged with administering a Texas Medicaid program to satisfy requirements beyond those mandated by federal law. Additionally, the petition poses a question on waiver of sovereign immunity that was never presented or passed upon by the courts below. Finally, this case is inappropriate for the Court's review because an alternative ground for affirmance exists that would require the Court to engage in a cumbersome, case-specific analysis of the consent decree that petitioners seek to enforce. Accordingly, the Court should deny the petition.

STATEMENT OF THE CASE[1]

This case involves a district court's endeavor to oversee state officials' administration of a Medicaid program aimed at the health care of indigent youth. The suit began in 1993 when petitioners alleged that state officials were failing to provide Medicaid benefits under the Texas version of the "early and periodic screening, diagnostic, and treatment services" (EPSDT) program in accordance with federal law. App. 6a-7a; 1.R.1; 3.R.821.[2]

In June of 1994, the district court certified the case as a class-action lawsuit, and, according to the district court, the class consists of over 1.5 million Texas youth.[3] App. 7a & n.6, 54a. In August

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1. The court of appeals correctly set out the factual and procedural history of the case. *See* App. 3a-11a.

2. References to the record in the court of appeals are cited as "__.R.__," with the first numeral representing the volume of the record and the second numeral indicating the page number.

3. The district court noted at the time it adopted the consent decree that the class represents about 26% of Texans under the age of 21.

1994, the district court denied the state officials' motion for dismissal, which argued that petitioners lacked the necessary federal rights to make their claims actionable under 42 U.S.C. §1983. 3.R.807. In conformance with a scheduling order, the parties conducted eight settlement negotiation sessions and developed a consent-decree proposal. App. 7a & n.7; 3.R.875; 3.R.1013. After conducting a fairness hearing, the district court approved and entered a consent decree in February 1996. App. 7a; 4.R.1028.[4] The consent decree is a lengthy document made up of 308 paragraphs of detailed and specific procedures for Texas's EPSDT program. App. 7a-8a & n.9.

Even before the consent decree, state officials operated a substantial EPSDT program that, according to the court of appeals's survey, underwent dramatic improvements.[5] App. 3a. Nevertheless, in November 1998, petitioners moved to enforce the decree, claiming that state officials had failed to fully comply with their interpretation of the decree. App. 9a-10a. The district court conducted an evidentiary hearing, and, on August 14, 2000, issued a 175-page decision, agreeing with petitioners, and rejecting the state officials' contentions that: the decree was largely unenforceable due to an absence of federal rights; the State's sovereign immunity precluded the district court from enforcing the decree beyond the requirements of federal law; and petitioners' extraordinarily expansive interpretation of the decree's provisions

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3.R.598.

4. Petitioners filed the consent decree with the Court as a lodging. *See* Pet. 1.

5. In fact, there was no evidence in this case that a single, eligible person requested services and did not subsequently receive them. *See* App. 4a, 101a-02a & n.51. In spite of all the improvements in the EPSDT program, some eligible Texans fail, for whatever reason, to fully utilize the services. *See* App. 4a.

was not supported by the agreement. 11.R.3628; App. 10a; App. 54a-275a.[6]

State officials appealed the August 14, 2000 order, which the Fifth Circuit stayed during the pendency of the appeal. App. 11a. Notwithstanding state officials' pending appeal and the stay, petitioners successfully sought leave in the district court to file a supplemental complaint adding new dental claims. App. 11a. The district court denied the state officials' motion to dismiss the supplemental complaint on the basis that the decree-enforcement appeal divested the district court of jurisdiction to grant the motion to supplement. The state officials filed a second appeal from that ruling, and the Fifth Circuit consolidated the two appeals. App. 11a.

The Fifth Circuit vacated the district court's orders in both appeals and remanded the case. App. 46a. Recognizing the Eleventh Amendment's limitation on the district court's subject-matter jurisdiction, the Fifth Circuit reaffirmed that court's prior holdings that the *Ex parte Young* exception to Eleventh Amendment immunity[7] permitted the district court to enforce the consent decree only to the reach of federal law. App. 19a-28a. To determine whether petitioners stated claims to which the *Young*

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6. By separate order, characterized as an initial "order of enforcement," the district court directed state officials to submit, within sixty days, "proposed corrective action plans to remedy each violation of the consent decree detailed in Part One of this court's Memorandum Opinion," gave petitioners thirty days to respond to the proposed plans, ordered the parties to meet in the subsequent fifteen days to facilitate agreement on a remedial order, and required the parties to report the results to the court. App. 277a-78a.

7. In *Young*, the Court held that official-capacity suits do not offend the Eleventh Amendment if they seek only injunctive relief, and allege that state officials are violating federal law. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

exception applied, the court reviewed established case law on the enforceability of federal rights under 42 U.S.C. §1983, and examined petitioners' complaints to determine whether they implicated federal rights that the district court could enforce. App. 13a-19a, 33a-39a. Upon conducting this review, the Fifth Circuit held that no enforceable rights were the subject of the district court's opinion. App. 12a.

The district court, by contrast, entered its orders without performing such an analysis. Instead, the court decided that all of the decree provisions were enforceable under its interpretation of the agreement. App. 13a-14a. State officials protested the district court's expansive reading of the consent decree to the Fifth Circuit, but that court never reached the interpretation questions because it determined that the district court's orders did not implicate enforceable federal rights. App. 12a.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because the Fifth Circuit correctly held that the Eleventh Amendment precludes the district court from enforcing consent-decree provisions that exceed the requirements of federal law. The court of appeals properly recognized that the *Ex parte Young* doctrine limits injunctive relief to enforcement of federal rights. That holding—which is entirely consistent with this Court's Eleventh Amendment jurisprudence and federal-rights decisions, as well as decisions by other circuits—does not warrant review.

Apart from the correctness of the Fifth Circuit's decision, the petition should be denied because the waiver-of-immunity issue presented was not properly litigated or decided by the courts below. Nor, contrary to petitioners' assertions, does the Fifth Circuit's decision implicate a circuit split or an important and unsettled question of federal law. *See* SUP. CT. R. 10(a), (c). Moreover, the case is an inappropriate candidate for review because strong,

alternative grounds exist for affirming the judgment below. And consideration of these grounds would mire the Court in a case-specific and cumbersome analysis of the terms of the consent decree that would not further federal interests. Accordingly, the Court should deny the petition for writ of certiorari.

REASONS TO DENY THE PETITION

I. BECAUSE THE WAIVER-OF-IMMUNITY ISSUE WAS INTERJECTED AT THE ELEVENTH HOUR, AND BECAUSE THE PETITION INCLUDES A DIFFERENT WAIVER QUESTION THAN THAT PRESENTED BELOW, THIS CASE IS AN INAPPROPRIATE CANDIDATE FOR REVIEW.

A. Petitioners Inadequately Pressed the Issue of Waiver of Sovereign Immunity Below by Raising the Issue for the First Time After Briefing in the Court of Appeals.

Petitioners never argued in the district court that the State of Texas waived its sovereign immunity. Moreover, nowhere in petitioners' briefing in the court of appeals did they assert a waiver of Eleventh Amendment immunity. Indeed, petitioners failed to raise the issue even after the court of appeals permitted them to file a twenty-seven page supplemental brief on a district-court decision regarding sovereign immunity in a Medicaid suit and on other issues in the appeal. *See Frazar v. Gilbert*, No. 00-41112, Appellees' Resp. Br. (May 22, 2001) (discussing, *inter alia*, *Westside Mothers v. Haveman*, 133 F.Supp.2d 549 (E.D. Mich. 2001), *rev'd*, 289 F.3d 852 (CA6), *cert. denied*, 123 S.Ct. 618 (2002)).

It was not until a letter filed in October 2001 pursuant to Federal Rule of Appellate Procedure 28(j), that petitioners alleged, *for the first time*, that the State's sovereign immunity somehow had been waived. With a one-sentence assertion, petitioners claimed that a particular paragraph—¶303—of the consent decree represents

"an express and unequivocal waiver of the Defendants' Eleventh Amendment immunity." Oct. 3, 2001 Letter 1 (quotation and citation omitted).[8] At no point below did petitioners argue that the State's mere agreement to the consent decree waived its Eleventh Amendment immunity, as they argue now for the first time in this Court.

As the Fifth Circuit noted, "[w]aiver of sovereign immunity is not a new concept." App. 39a n.95. Petitioners had ample opportunity to properly press a waiver argument in the courts below and failed to do so.[9] Despite petitioners' waiver of such arguments, the Fifth Circuit's opinion addressed their belated and undeveloped waiver contention—albeit in a cursory dismissal within a closing section entitled "Other Issues." App. 39a. With no real briefing by the parties on this issue in the courts below and no comprehensive analysis in the Fifth Circuit's opinion, the issue has not been

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8. Petitioners repeated that ¶303 assertion in a later Rule 28(j) letter. *See* May 17, 2002 Letter (citing *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 122 S.Ct. 1640 (2002)). Again, the sole basis of waiver alleged was the language in ¶303.

9. Courts have uniformly barred late invocations of waiver like that of petitioners, even under an "intervening-decision" exception. *See, e.g., In re Hood*, No. 01-5769, 2003 WL 21496, at *3 (CA6 Feb. 3, 2003); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 331-32 (CA5 2002); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50-51 (CA1 2002); *Martinez v. Tex. Dep't of Crim. Justice*, 300 F.3d 567, 573-75 (CA5 2002); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002), *pet. for cert. filed*, 71 U.S.L.W. 3476 (U.S. Nov. 4, 2002) (No. 02-1034); *In re Gosselin*, 276 F.3d 70, 72 (CA1 2002); *Power v. Summers*, 226 F.3d 815, 819 (CA7 2000). This procedural default rule, twice invoked by the Fifth Circuit since its decision in this case, *see Perez*, 307 F.3d, at 331-32; *Martinez*, 300 F.3d, at 573-75, enables courts to evaluate waiver claims with the benefit of argument and record development—elements that are decidedly missing in this case.

readied for the Court's review.[10] And to the extent any waiver issue was raised—belatedly and insufficiently—in Rule 28(j) letters, that issue was limited to whether ¶303 of the decree was an express waiver of immunity. The distinct issue advanced by petitioners for the first time in this Court is whether agreement to the consent decree in general waives immunity.[11]

Given that the district court never had an opportunity to evaluate the litigation conduct in its own court to determine if an effective waiver had occurred, and the court of appeals was likewise deprived, it would be ill-advised for the Court to decide the petition's issue of waiver, when resolution is necessarily dependent on the litigation circumstances. Without adequate development by the parties or the courts below, the Court should follow its practice

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10. Petitioners' failure to even hint at waiver of immunity until briefing was over deprived state officials of the ability to address significant matters that should have been aired before reaching this Court. The court of appeals limited the state officials to two pages of supplemental briefing regarding the ¶303 waiver-of-immunity contention. *See Frazar v. Gilbert*, No. 00-4112, Mar. 26, 2002 Letter Brief. The result is a record lacking consideration of any relevant factors, such as, for example, the element of "voluntariness" in light of the fact that negotiations, the fairness hearing, and adoption of the consent decree all occurred prior to the resurgence of this Court's federalism jurisprudence starting with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

11. Petitioners also point for the first time, in passing, to other litigation conduct by state officials in defending the case. *See* Pet. 8, 9 & n.4, 12, 13 n.7. The factual circumstances of state officials' conduct over the course of the litigation, however, has never been evaluated by either the district court or the court of appeals, *see* App. 39a-42a, and petitioners never relied on those selective aspects from the case's history when they belatedly asserted a waiver based on ¶303. *See* Oct. 3, 2001 Letter 1. Similarly, petitioners direct the Court to a provision in the consent decree (¶302) that has also gone unexamined by the lower courts. *See* Pet. 12.

of not considering constitutional questions that were not appropriately "pressed or passed upon below" and decline to entertain petitioners' new challenge to the State's sovereign immunity. *See Duignan v. United States*, 274 U.S. 195, 200 (1927).[12]

B. This Case Does Not Implicate a Circuit Split on the Issue of Waiver That Warrants the Court's Review.

Petitioners claim that the Fifth Circuit concluded that state officials do not waive Eleventh Amendment immunity by urging entry of a consent decree and that other courts of appeals disagree on this point. *See* Pet. 8-9. The Fifth Circuit, however, did not reach a holding of such precision. Rather, it rejected petitioners' waiver contention in fairly short fashion without full analysis of consent-decree conduct.

Petitioners erroneously claim that five circuits disagree with the Fifth Circuit and endorse waiver by consent decree. Pet. 8. Petitioners include the Seventh and Ninth Circuits in their list, but the cited decisions from those courts merely recite the prerequisites for modification and termination of a decree. *See Komyatti v. Bayh*, 96 F.3d 955, 962-63 (CA7 1996); *Hook v. Ariz. Dep't of Corr.*, 972

12. The Court has consistently refused to consider arguments advanced for the first time in this Court. *See, e.g., Meyer v. Holley*, No. 01-1120, 2003 WL 141310, at *8 (Jan. 22, 2003); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Lytle v. Household Mfg.*, 494 U.S. 545, 551 n.3 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (1989); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

F.2d 1012, 1016 (CA9 1992).[13] Decisions from the remaining three circuits likewise fail to demonstrate a real division.

Two of the decisions do not directly resolve whether agreeing to a consent decree waives sovereign immunity and instead address collateral attacks on judgments for lack of subject matter jurisdiction. Pet. 9 (citing *Garrity v. Sununu*, 752 F.2d 727, 737-38 & nn. 8, 10 (CA1 1984), and *Mitchell v. Comm'n on Adult Entm't. Establishments*, 12 F.3d 406, 408-09 (CA3 1993)). And the remaining two decisions cited by petitioners also fail to demonstrate division on the question sought to be reviewed. *Vecchione v. Wohlgemuth*, a twenty-five-year-old Third Circuit decision, was an appeal in a settled contempt action against state officials that the court held did not implicate Eleventh Amendment concerns and, *assuming* in dicta that it did, required an inference of waiver from the failure to ever raise Eleventh Amendment immunity in related litigation that was long since final. 558 F.2d 150, 152-53, 158-59 (CA3 1977). Because the court itself disclaimed any Eleventh Amendment holding, *Vecchione* is most properly classified as another collateral-attack decision.

Similarly, petitioners misplace reliance on the Second Circuit's decision in *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (CA2 1989) (citing *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (CA2 1979)), which addressed waiver of sovereign immunity as an aside, citing a decision that itself addressed waiver

13. These cases, together with others cited by petitioners, Pet. 10, express the proposition that consent decrees should be obeyed until they are modified or vacated. That principle was not contradicted by the Fifth Circuit, as petitioners vaguely suggest, and it has never been challenged by state officials. Petitioners concede elsewhere that state officials made efforts to satisfy the consent decree. Pet. 9. Petitioners' citation to decisions setting out the standards for modification or termination of a decree fails to demonstrate a conflict or illuminate any error on the part of the Fifth Circuit.

by consent decree in an alternative holding. The dicta in that earlier decision was later flatly rejected by the Second Circuit. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 727 F.2d 240, 244 (CA2 1984). Because *Kozlowski*'s waiver-by-consent-decree comment does not represent the view of the Second Circuit—and because it lacks any waiver analysis of its own—that decision cannot anchor a conflict with the Fifth Circuit.[14]

Nor, as petitioners erroneously claim, does the Fifth Circuit's holding conflict with *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S.Ct. 1640 (2002).[15] Pet. 11-14. In *Lapides*, the Court decided a very narrow question: "whether a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court." *Id.*, at 1642-43 (citation and quotation omitted). The Court limited its answer to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.*, at 1643. In *this* case, by contrast, the state officials did not remove this case but were involuntarily hauled into federal court. This distinction is critical. *See id.*, at 1645 ("[T]he Eleventh Amendment waiver rules are different when a State's federal court

14. Indeed, petitioners' waiver argument is inconsistent with courts' repeated rejection of the notion that entry into a consent decree constitutes a waiver of sovereign immunity. *See, e.g., Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1195 (CA10 1998) (state officials' agreement to consent decree not a waiver); *Johns v. Stewart*, 57 F.3d 1544, 1554 (CA10 1995) (State's partial settlement does not constitute waiver absent unequivocal expression of waiver); *Saahir v. Estelle*, 47 F.3d 758, 762 (CA5 1995) (entry into consent decree not an unequivocal expression of waiver); *Carey*, 727 F.2d, at 244 (agreement to consent decree does not constitute waiver).

15. The petition also suggests an inconsistency with *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 292 (1906), Pet. 11, but includes no explanation of how the decision is pertinent.

participation is involuntary.") In addition, this case does not involve an underlying claim for which the State explicitly waived its immunity from suit in state court and then attempted to regain immunity through removal. *See id.*, at 1643, 1645.

Most importantly, no court has relied on *Lapides* to find a waiver of immunity. Accordingly, it is premature for petitioners to ask the Court to decide a waiver-of-immunity issue that has not percolated in the lower courts.

C. No Waiver of Eleventh Amendment Immunity Occurred in This Case.

As previously discussed in Part I.A, *supra*, the waiver-of-sovereign-immunity issue now advanced was not pressed or passed upon in the courts below such that the issue is suitably presented for review. Moreover, consideration of this issue is unwarranted because the Court's Eleventh Amendment jurisprudence confirms that no waiver occurred in this case. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court reconfirmed the requirement that waivers of sovereign immunity be explicit and unequivocal, squarely rejecting the concept of constructive waiver:

> [O]ur test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction. *Id.*, at 675-76 (citations & quotations omitted); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed").

Petitioners do not suggest that state officials expressly consented to suit in federal court. Rather, they erroneously contend

in this Court that state officials affirmatively invoked the federal court's jurisdiction, causing a waiver of immunity under *Lapides*. As already explained, *see* I.B *supra*, the circumstances of this case are distinct from *Lapides* and do not constitute a voluntary invocation of federal-court jurisdiction. And, to the extent petitioners contend that there was an implied or constructive waiver, *College Savings* forecloses that theory. *See* 527 U.S., at 680; *see also Pennhurst II*, 465 U.S., at 99; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).[16]

Absent "[a] clear indication of the State's intent to waive its immunity," *Lapides*, 122 S.Ct., at 1644, the Eleventh Amendment remains intact and shields the State from suit. This case is squarely controlled by the Court's Eleventh Amendment jurisprudence,

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16. Petitioners contend that the Fifth Circuit should have implied a waiver from inconspicuous provisions of the consent decree that do not mention sovereign immunity. A waiver of Eleventh Amendment immunity, however, cannot be implied. *See Coll. Sav.*, 527 U.S., at 680; *Edelman*, 415 U.S., at 673; *Pennhurst II*, 465 U.S., at 99. Instead, a State must expressly and unequivocally consent to suit in federal court or affirmatively invoke the jurisdiction of a federal district court by, for example, removing a state-law claim for which immunity has been waived in state court. *See Lapides*, 122 S.Ct., at 1643. Nothing remotely comparable occurred in this case. And the federal courts of appeals to consider *Lapides*' waiver holding have limited its application to removal circumstances. *See, e.g., Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1206 (CA10 2002) ("It is only when a State removes federal-law claims from state court to federal court that it submits its rights for judicial determination and unequivocally invokes the jurisdiction of the federal courts.") (citation and quotation omitted); *R.I. Dep't*, 304 F.3d, at 48-49 (rejecting argument that a State waives its immunity by voluntarily participating in any facet of a federal adjudicative proceeding); *see also, e.g., Watters*, 295 F.3d, at 42 n.13 (observing that *Lapides* does not extend to attorney's liens for which immunity has not been waived in sovereign's courts).

which precludes an inference of waiver. Accordingly, no important or unsettled question of federal law warrants review.

II. No Statutory Issues Warrant the Court's Review.

A. The Fifth Circuit Properly Decided That the Eleventh Amendment Limits a District Court's Consent-Decree Jurisdiction to Enforcement of Federal Rights.

Although petitioners contend that other circuits disagree with the Fifth Circuit's conclusion that the district court's jurisdiction to enforce a consent decree is limited by the Eleventh Amendment, Pet. 14-17, the decisions petitioners cite are inapposite because they either do not address this enforceability question or they fail to consider the Eleventh Amendment.

For example, petitioners rely on *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), in which the Court held that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." The Fifth Circuit, however, did not reason inconsistently with *Firefighters* because it did not predicate the limitation on the district court's enforcement power on the difference between the relief available in a consent judgment as opposed to an adverse judgment on the merits. The Fifth Circuit simply found *Firefighters* inapplicable to a jurisdictional inquiry. App. 21a-25a. Moreover, as the court of appeals rightly recognized, the *Firefighters* decision addressed standards for the *entry* of consent decrees and did not involve either the enforcement of a consent decree or the Eleventh Amendment. *See* App. 21a-22a., 26a & n.67.

Similarly, in *Komyatti v. Bayh*, Pet. 15, state officials did *not* challenge the power of a federal court to enforce consent-decree provisions that exceed federal law. 96 F.3d 955, 958 (7th Cir. 1986). And the Seventh Circuit did not hold that a district court

could do so. Indeed, a later opinion confirms that the Seventh Circuit, like the Fifth Circuit, permits enforcement only of consent-decree obligations that rest on federal law. *See Evans v. City of Chicago*, 10 F.3d 474, 479 (CA7 1993) (en banc). Indeed, the cases petitioners cite do not address the enforceability and Eleventh Amendment questions considered by the Fifth Circuit. Accordingly, no division results from these cases. *See* Pet. 15-17.

Even *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (CA2 1989), which registers disagreement with the Fifth Circuit's jurisdictional view of consent-decree enforcement, fails to create a conflict. Relying heavily on *Firefighters'* discussion of prerequisites for *entry*, not enforcement, of a consent decree, the Second Circuit in *Kozlowski* sidestepped the Eleventh Amendment and rested its decision on the perceived inequities of releasing state officials from their bargain. *Id.*, at 244-45. As such, the opinion offers no reasoning that directly engages—much less contradicts—the Fifth Circuit's Eleventh Amendment holding.

Far from conflicting with other courts' analyses of the Eleventh Amendment question, the Fifth Circuit's opinion is consistent with decisions of courts that have squarely contemplated the implications of the Eleventh Amendment in the consent decree context. *See, e.g., Sweeton v. Brown*, 27 F.3d 1162, 1166 (CA6 1994) (en banc) (concluding that consent decree should be vacated because no basis in federal law supported its continuance); *Evans*, 10 F.3d, at 479-81 (holding that district court cannot require state to abide by consent decree that lacks basis in federal law); *see also Washington v. Penwell*, 700 F.2d 570, 574-75 (CA9 1983) (concluding that funding provision in consent decree was unenforceable because it exceeded constitutional requirements).

And all of these decisions are consistent with the fundamental Article III tenet that parties cannot broaden the constitutional scope of a federal court's power by agreement or consent. *See, e.g., Ins.*

Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951). Petitioners fail to account for this jurisdictional principle in asserting that the requirements of federal law should not be the outer boundary of a district court's enforcement powers. Moreover, petitioners ignore this Court's admonition that "the *Young* doctrine rests on the need to promote the vindication of *federal* rights." *Pennhurst II*, 465 U.S., at 105 (emphasis added).

This long-standing principle is not contradicted by *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S.Ct. 1753, 1761 (2002), as petitioners erroneously suggest. *Verizon* did not concern a consent decree or the reach of a federal court's enforcement power. When enforcing a consent decree, a court must assess alleged violations and determine whether remedial jurisdiction exists, and *Verizon* does not suggest otherwise.

The Fifth Circuit conducted an Eleventh Amendment analysis within the consent-decree context that is consistent both with this Court's Eleventh Amendment jurisprudence and the decisions of other courts of appeals that have addressed enforcement issues in the face of a defendant's assertion of Eleventh Amendment immunity. No conflict or important and unsettled question is presented, and the Court should deny the petition.

B. This Case Presents No Question of EPSDT Rights That Warrants the Court's Review.

Petitioners claim that this case involves an important question regarding federal Medicaid rights, but they fail to present a particular statutory concern or identify a division in the circuits over a specific EPSDT issue. An even more fundamental flaw is that petitioners' EPSDT arguments rest on a misapprehension of the Fifth Circuit's holding.

The Fifth Circuit did not, as petitioners claim, "decide[] that indigent children who qualify for Medicaid do not have a right to actually receive the EPSDT information, screens and services that they need." Pet. 24 (citing App. 33a-39a). The court simply reviewed the petitioners' complaints about the Texas EPSDT program and decided that these particular grievances were not premised on enforceable federal rights.[17]

Although petitioners are dissatisfied with the result reached by the court of appeals, there is nothing unusual or erroneous about the analysis conducted by the court. To determine whether petitioners could enforcement of federal rights, the court performed the formulaic analysis that has been followed in countless other cases under the standards of *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997)—which were reaffirmed by the Court last term in *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

To the extent petitioners dispute the Fifth Circuit's conclusion

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17. For instance, although petitioners sought changes in state officials' provision of screening services, the court of appeals decided that petitioners had not asked the district court to enforce any federal right related to those services. The Fifth Circuit observed that the Medicaid statute requires screening services to be provided "where they are requested," and concluded that petitioners had not complained about a federal right remediable under §1983 because there was no evidence that a single class member had requested services but not received them. App. 33a (citing 42 U.S.C. §1396a(a)(43)(B)). Indeed, petitioners implicitly acknowledge that the Fifth Circuit did not hold that all EPSDT provisions are unenforceable. *See* Pet. 24 ("[T]he Fifth Circuit implied that EPSDT provisions may create rights.") (citing App. 28a). In fact, the Fifth Circuit expressly reaffirmed the continued vitality of *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983), and *Evergreen v. Hood*, 235 F.2d 908 (CA5 2000), two decisions recognizing the enforceability of certain federal Medicaid rights. *See* App. 16a-19a.

based on its application of established and undisputed principles, that complaint presents an error-correction question not suitable for this Court's review. *See, e.g., Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J. dissenting) (noting that "this Court is not a forum for the correction of errors").

Nor do petitioners identify a specific Medicaid provision that is the subject of disagreement between courts of appeals or that contradicts this Court's or any other's federal-rights reasoning. Instead, petitioners reference all of the EPSDT statutory provisions as a whole and, without analyzing any particular provision, assert that "the EPSDT provisions . . . meet the *Gonzaga-Blessing* test for whether a statute creates enforceable rights." Pet. 22 (citing 42 U.S.C. §1396a(a)(43)). This flawed reasoning contradicts *Blessing*'s rejection of such "undifferentiated whole" analysis. 520 U.S., at 342. In the same cursory vein, petitioners mention the three components of the *Blessing* analysis for enforceable federal rights, but address the second and third elements solely in a one-sentence conclusory statement. *See* Pet. 22-23. This analysis fails to engage, much less reveal any error in, the fully reasoned application of the complete *Blessing* test.

For example, petitioners cite (without explanation or argument) *Stanton v. Bond*, 504 F.2d 1246, 1250 (CA7 1974), a case that predates *Blessing* and *Wilder* and, therefore, lacks the federal-rights analysis established by those cases. Petitioners also erroneously attempt to demonstrate circuit disagreement about EPSDT rights by relying on arguments made in petitions for certiorari in other cases. *See* Pet. 23 (citing Pet. for Cert., *Odom v. Antrican*, No. 02-220; Pet. for Cert., *Haveman v. Westside Mothers*, No. 02-277).[18] Tellingly, petitioners do not, and cannot, contend that the lower courts' decisions in those two cases conflict with the Fifth Circuit's

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18. The Court denied the petition in *Antrican* on October 21, 2002 and the petition in *Westside Mothers* on December 2, 2002.

decision in this case.

Without identifying a particular federal right or a true circuit division, petitioners present no federal question that warrants the Court's review on the correct application of *Blessing* in the Medicaid context.

III. Alternative Grounds for Affirmance Make this Case an Inappropriate Candidate for Review.

If the Court were to grant the petition, respondent officials would defend the judgment below by advancing alternative grounds for affirmance raised in the Fifth Circuit briefing but not reached by that court. *See Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982) (noting the respondents "may rely upon any matter appearing in the record in support of the judgment below"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (explaining that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below").

Although the court of appeals's disposition pretermitted consideration of the parties' disputes over the many decree provisions, a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Although this strong ground for affirming the judgment would be presented for this Court's review should it grant the petition, the existence of this alternative ground for affirmance provides yet another reason why this case is an unsuitable vehicle for review of the questions urged by petitioners. The Court would become mired in a wide-ranging collection of decree provisions and an evidentiary record regarding the delivery of health care services by Texas's EPSDT program. Indeed, the bulk of the district court's 175-page opinion was dedicated to an interpretation of the 308-paragraph consent decree and an evaluation of state officials'

delivery of EPSDT services using statistical and anecdotal evidence. Because the issues related to interpretation of the decree and assessment of any violations under its terms concern only a particular order as applied to a discrete set of facts, this case does not merit the Court's attention.

Conclusion

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 02-628

IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, Carla Frew, *et al.*,

Petitioners,

v.

ALBERT HAWKINS, Commissioner of the Texas Health and Human Services Commission, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do State officials waive Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court's ongoing supervision of the officials' decree compliance?

2. Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by State officials unless the plaintiffs show that the "decree violation is also a violation of a federal right" remediable under § 1983?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Linda Frew, as next friend of her minor child, Carla Frew,

Maria Ayala, as next friend of her minor children, Christopher Arizola, Leonard Jimenez and Joseph Veliz,

Mary Fisher, as next friend of her minor child, Tyrone T. Edwards,

Mary Jane Garza, as next friend of her minor children, Hilary Garza and Sarah Renea Garza,

Charlotte Garvin as next friend of her minor children, Johnny Martinez, Brooklyn Garvin and BreAnna Garvin, and

Shannon Garcia, as next friend of her minor children, Andrew Garcia, Marisha Garcia, Stephen Sanchez and Allison Sanchez

Respondents, all sued in their official capacities only:

Albert Hawkins, Texas Commissioner of Health and Human Services,

Jason Cooke, Texas State Medicaid Director,

Eduardo Sanchez, MD, Texas Commissioner of Health,

Bridgett Cook, employee of Texas Department of Health, and

Susan Penfield, MD, employee of Texas Department of Health

Notes of Explanation: The style of this case in the district court is *Frew v Gilbert*; in the court of appeals the style is *Frazar v Gilbert*. Plaintiff Frazar is not before this Court because the district court voluntarily dismissed her in 1994.

Further, when Petitioners sought a writ of certiorari in this Court, Don Gilbert was the lead Respondent. He has since resigned so Petitioners have substituted his successor in office, Albert Hawkins, Texas Commissioner of Health and Human Services. Linda Wertz has also resigned so Petitioners have substituted her successor in office, Jason Cooke, Texas State Medicaid Director.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	x
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Children's Suit for EPSDT Services	2
B. After Discovery And Lengthy Negotiations, The Parties Propose The Consent Decree	4
C. The District Court Approves The Consent Decree, As Urged By The Texas Attorney General	6
D. The State Officials' Actions After Entry Of The Decree Demonstrate Their Continued Assent To The Order And The District Court's Jurisdiction Over Them	7
E. The Children's Motion To Enforce The Consent Decree	7

Contents

	Page
F. The District Court's Memorandum Opinion And Remedial Order To Enforce The Consent Decree	8
1. Jurisdiction To Enforce The Decree	8
2. State Officials Violated The Decree	11
G. The District Court's Forward-Looking Remedial Order Accommodates The Officials' Exercise Of Discretion	13
H. The Court Of Appeals' Decision	13
1. According To The Fifth Circuit, The Officials Did Not Waive The Eleventh Amendment	13
2. According To The Court Of Appeals, A Consent Decree Can Be Enforced Only If A Decree Violation Is Also A Violation Of Federal Rights.	14
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. WHEN STATE OFFICIALS ACTIVELY URGE A FEDERAL COURT TO ENTER A CONSENT DECREE THAT 1) SPECIFICALLY PROVIDES FOR THE FEDERAL COURT'S ONGOING SUPERVISION OF DECREE COMPLIANCE AND 2) BY ITS OWN TERMS CREATES	

Contents

Page

"MANDATORY, ENFORCEABLE" OBLIGATIONS, THEY WAIVE SOVEREIGN IMMUNITY FROM DECREE ENFORCEMENT 18

A. STATE OFFICIALS WAIVE SOVEREIGN IMMUNITY FROM DECREE ENFORCEMENT BY VOLUNTARY, CLEAR LITIGATION ACTS THAT INVOKE THE COURT'S JURISDICTION. 21

B. IN THIS CASE, LITIGATION CONDUCT WAIVED SOVEREIGN IMMUNITY AS TO DECREE ENFORCEMENT 22

1. The Officials Actively Pursued The Decree 22

2. Waiver Was Voluntary 24

a. State officials can voluntarily waive immunity even though they are defendants 25

b. The officials' assertion of sovereign immunity before or after they waived it does not defeat their waiver of the Eleventh Amendment's protections as to decree enforcement 26

3. Waiver Was Clear And Unequivocal 26

Contents

Page

a. The court of appeals applied the wrong legal test to determine clarity of waiver 28

b. The State officials' denial of liability in the decree does not defeat their waiver of immunity 29

4. The Texas Attorney General Has Authority To Waive Eleventh Amendment Immunity During Litigation 29

C. IT WOULD IMPUGN THE COURTS' INTEGRITY TO ALLOW STATE OFFICIALS TO ACTIVELY URGE A COURT TO ENTER A DECREE AND THEN ASSERT THAT THE COURT LACKS JURISDICTION TO ENFORCE THE DECREE 31

D. SOVEREIGN IMMUNITY DOES NOT BAR THE DISTRICT COURT'S ENFORCEMENT ORDERS BECAUSE THOSE ORDERS ARE ANCILLARY TO THE CONSENT DECREE AND THE DISTRICT COURT HAS JURISDICTION OVER THE DECREE 33

II. *EX PARTE YOUNG* PERMITS ENFORCEMENT OF A CONSENT DECREE THAT IS BASED ON FEDERAL LAW AGAINST STATE OFFICIALS, EVEN IF DECREE VIOLATIONS ARE NOT ALSO VIOLATIONS OF FEDERAL RIGHTS 34

Contents

Page

A. In *Ex parte Young* Cases, Sovereign Immunity Does Not Bar Forward-Looking Enforcement Of A Decree That Provides Prospective Relief 34

B. The Eleventh Amendment Does Not Require A Federal Court To Find A Violation Of A Federal Right Before Enforcing A Consent Decree 36

C. The Eleventh Amendment Should Not Require A "Public Mea Culpa" Or Finding That State Officials Violate Federal Law Before A Consent Decree Can Be Enforced 37

D. The Lower Court's Rule Unduly Restricts Federal Courts' Equitable Powers 38

E. Contrary To Principles Of Basic Fairness, Under The Court Of Appeals' Rule It Would Be Impossible For Consent Decrees To BE "Specific In Terms" And "Describe In Reasonable Detail ... The Act Or Acts Sought To Be Restrained" When State Officials Are Defendants. Fed. R. Civ. P. 65(d) 40

F. Contrary To Important Principles Of Judicial Administration, The Court OF Appeals' Rule Would Make Consent Decrees Useless In Cases Against State Officials 41

Contents

Page

G. When A Federal Court Properly Enters A Consent Decree In A Case Based On Federal Law, Sovereign Immunity Does Not Bar Enforcement Of The Decree Against State Officials 42

1. Congress' Purposes In Medicaid And EPSDT 43

2. The Consent Decree Furthers Congress' Purposes In Medicaid And EPSDT 45

CONCLUSION 49

TABLE OF CITED AUTHORITIES

Page

CASES

Alden v Maine, 527 U.S. 706 (1999) .. 15, 18, 19, 20, 35

Bell v Wolfish, 441 U.S. 520 (1979) 38

Clark v Barnard, 108 U.S. 436 (1883) 19, 21, 22

College Sav. v Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 21, 26, 28

Cooper v Aaron, 358 U.S. 1 (1958) 33

Coopers & Lybrand v Livesay, 437 U.S. 463 (1978) . 37

Dunn v New York State Dep't of Labor, 47 F.3d 485 (2d Cir. 1995) 46

Duran v Carruthers, 885 F.2d 1485 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) 36

Evans v Jeff D., 475 U.S. 717 (1986) 19

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Firefighters v City of Cleveland, 478 U.S. 501 (1986) ..... *passim*

Gardner v State of New Jersey, 329 U.S. 565 (1947) 21, 22, 27

Gates v Collier, 501 F.2d 1291 (5th Cir. 1974) 39

Page

Gonzaga v Doe, 536 U.S. 273 (2002) 2, 25, 45

Green v Mansour, 474 U.S. 64 (1985) 16, 35, 41

Gunter v Atlantic Coast Line R. Co., 200 U.S. 273 (1906) ..... *passim*

Hans v Louisiana, 134 U.S. 1 (1890) 19

Hook v State of Ariz. Dep't. of Corrections, 972 F.2d 1012 (9th Cir. 1992) 32

Hutto v Finney, 437 U.S. 678 (1978) 46

Idaho v Coeur d'Alene Tribe, 521 U.S. 261 (1997) 34, 36

Johnson v Zerbst, 304 U.S. 458 (1938) 26

Kokkonen v Guardian Life Ins., 511 U.S. 375 (1994) ..... *passim*

Komyatti v Bayh, 96 F.3d 955 (7th Cir. 1996) 36

Kozlowski v Coughlin, 871 F.2d 241 (2d Cir. 1989) 31, 36, 42

Lapides v Bd. of Regents of Univ. System, 535 U.S. 613 (2002) ..... *passim*

Lawyer v Dep't. of Justice, 521 U.S. 567 (1997) 19, 25, 37

Page

Lelsz v Kavanagh, 807 F.2d 1243, 1252 (5th Cir. 1987) (*Lelsz I*), *reh'g en banc denied*, 815 F.2d 1034 (*Lelsz II*), *subsequent panel decision*, 824 F.2d 372 (*Lelsz III*), *cert. dismissed*, 483 U.S. 1057 (1987) 8, 9, 14, 36, 48

Lelsz v Kavanagh, 815 F.2d 1034 (*Lelsz II*), *subsequent panel decision*, 824 F.2d 372 (*Lelsz III*), *cert. dismissed*, 483 U.S. 1057 (1987) 39

Marek v Chesney, 473 U.S. 1 (1985) 19

Miller v French, 530 U.S. 327 (2000) 32, 38

Miller v Whitburn, 10 F.3d 1315 (7th Cir. 1993) ... 44

Milliken v Bradley, 433 U.S. 267 (1977) .. 17, 39, 40, 47

Mitchell v Forsyth, 472 U.S. 511 (1985) 29

Mitchell v Johnston, 701 F.2d 337 (5th Cir. 1983) .. 44

Pennhurst State School and Hosp. v Halderman, 465 U.S. 89 (1984) 8, 35, 36

Pereira v Kozlowski, 996 F.2d 723 (4th Cir. 1993) ... 44

Pittman v Secretary, Florida Dep't of Health and Rehabilitative Services, 998 F.2d 887 (11th Cir. 1993) 44

Plyler v Evatt, 924 F.2d 1321 (4th Cir. 1991) ...32, 42, 43

Page

Puerto Rico Aqueduct v Metcalf & Eddy, 506 U.S. 139 (1993) 16, 29, 35, 37

Regents of the University of New Mexico v Knight, 321 F.3d 1111 (Fed. Cir. 2003) 19, 28

Roell v Withrow, 2003 U.S. Lexis 3427 (April 29, 2003) 31, 32

Rufo v Inmates of Suffolk County Jail, 502 U.S. 367 (1992) ..... *passim*

Schmidt v Lessard, 414 U.S. 473 (1974) 40, 41

Scott v United States Dep't. Of Justice, 920 F. Supp. 1248 (M.D. Fla. 1996) 37

Smith v Reeves, 178 U.S. 436 (1900) 28

Spallone v United States, 493 U.S. 265 (1990) 40

Sterling v Constantin, 287 U.S. 378 (1932) 33

Suter v Artist M., 503 U.S. 347(1992) 29, 37, 38

Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 39

Terrazas v Ramirez, 829 S.W.2d 712 (Tex. 1991) .. 30

United States v Armour, 402 U.S. 673 (1971) ..28, 29, 38

United States v ITT Continental Baking, 420 U.S. 223 (1975) 29

Page

United States v United Shoe Machinery Corp., 391 U.S. 244 (1968) 40

Verizon Md. v Pub. Serv. Comm'n., 535 U.S. 635 (2002) ..... *passim*

Walker v City of Birmingham, 388 U.S. 307 (1967) .. 32

Wilder v Virginia Hospital Association, 496 U.S. 498 (1990) 2, 25, 45

Wisconsin Dept. of Corrections v Schacht, 524 U.S. 381 (1998) ..... *passim*

Wisconsin Hosp. Ass'n. v Reivitz, 820 F.2d 863 (7th Cir. 1987) 35

CONSTITUTIONAL PROVISIONS

Tex. Const. Art. IV, § 22 30

U.S. Const. amend. XI ..... *passim*

U.S. Const. art. VI, cl.2 ..... 1, 33

STATUTES

1993 Tex. Gen. Laws, 4564 (73rd Regular Session) .. 30

1995 Tex. Gen. Laws 5260-5261 (74th Regular Session) 30

1997 Tex. Gen. Laws 5552 (75th Regular Session) ... 30

Page

1999 Tex. Gen. Laws 5467 (76th Regular Session) ... 30

2001 Tex. Gen. Laws 5434 (77th Regular Session) 30

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... 2, 43

42 U.S.C. § 1396 .....43, 44

42 U.S.C. § 1396a(a) 35

42 U.S.C. § 1396a(a)(8) 13

42 U.S.C. §§ 1396a(a)(30)(A) 13

42 U.S.C. §§ 1396a(a)(43) ..... *passim*

42 U.S.C. §§ 1396a(a)(43)(A) ..... *passim*

42 U.S.C. §§ 1396a(a)(43)(B) ..... *passim*

42 U.S.C. §§ 1396a(a)(43)(C) ..... *passim*

42 U.S.C. §§ 1396d(a)(19) 47

42 U.S.C. § 1396d(r) ..... *passim*

42 U.S.C. § 1396d(r)(1)(B)(iii) 12

42 U.S.C. § 1396d(r)(1)(B)(iv) 12

42 U.S.C. § 1396d(r)(5) 44

42 U.S.C. § 1396n(g) 47

Cited Authorities

	Page
42 U.S.C. § 1396u-2	10
42 U.S.C. § 1983	i, 1, 4
RULES	
Federal Rule of Civil Procedure 60(b)	32
Federal Rule of Civil Procedure 65(d)	40, 41
MISCELLANEOUS	
J. Elliot, Debates on the Federal Constitution (2d ed. 1854)	19
Newberg on Class Actions (4th Ed. 2002)	25
The Federalist No. 81	19
Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction (2d Ed. 1992)	25, 35

OPINIONS BELOW

The court of appeals' decision is reported at 300 F.3d 530 (5th Cir. 2002) and reprinted in Appendix A to the Petition for Writ of Certiorari ("Pet. App."). The district court's decision denying the Respondent State officials' motion to dismiss (filed May 17, 2001) is reprinted in Pet. App. B. The district court's decision permitting supplementation of the complaint (filed March 12, 2001) is reprinted in Pet. App. C. The district court's memorandum opinion finding violations of the consent decree is reported at 109 F. Supp. 2d 579 (E.D. Tex. 2000). The memorandum opinion and the district court's remedial order (both filed August 14, 2000) are reprinted in Pet. App. D. The consent decree (filed February 20, 1996) is lodged with the Clerk (hereinafter "L.")

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 24, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution; U.S. CONST. amend. XI; 42 U.S.C. §§ 1396a(a)(43); 1396d(r) and 42 U.S.C. § 1983 are reprinted in Pet. App. E. Finally, the Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl.2.

STATEMENT OF THE CASE

The Respondent State officials ("State officials" or "officials") actively urged the district court to enter a consent decree that by its own terms 1) was "reached within the framework of federal law," 2) created "mandatory, enforceable" obligations, and 3) specifically allows the parties to "request relief from" the federal district court if disputes arise about decree compliance. L.; ¶¶302, 303, 308. Despite urging the district court to enter the decree, the State officials now urge this Court that the Eleventh Amendment to the United States Constitution bars the district court from enforcing its properly entered consent decree.

A. The Children's Suit For EPSDT Services. The Petitioner mothers filed suit in 1993 because the officials were not providing the Petitioner children with Early and Periodic Screening, Diagnostic and Treatment services (EPSDT).[1] 42 U.S.C. §§ 1396a(a)(43); 1396d(r). The district court has jurisdiction over the dispute. 28 U.S.C. § 1331. The children seek only prospective relief from State officials sued in their official capacities. *Ex parte Young*, 209 U.S. 123 (1908).

When States accept federal Medicaid funds, they must follow federal Medicaid requirements. *Wilder v Virginia Hospital Association*, 496 U.S. 498, 502 (1990), *cited with approval in Gonzaga v Doe*, 536 U.S. 273, 280, 289 n.6 (2002). EPSDT is a required service. 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

Through EPSDT, Congress created a practical approach to health care for indigent children. Medicaid officials "must . . . provide for"

- informing all Medicaid recipients under the age of 21 about EPSDT and immunizations,
- providing or arranging for screens "in all cases where they are requested," and

1. Petitioners refer to themselves as the "children" in this brief.

- "arranging for (directly or through referral to appropriate agencies, organizations, or individuals)" all necessary treatment.

42 U.S.C. §§ 1396a(a)(43); *see also*, 42 U.S.C. § 1396d(r).

Preventive screens are EPSDT's "foundation." Order Concerning Fairness of Consent Decree at 6, *quoting* Former Defendant Texas Commissioner of Health Dr. Smith ("Fairness Order"). Physicians and dentists agree that preventive care can help indigent children to avoid health problems, *id.* at 10-12, and that preventive care is a good investment. *Id.* at 12-14. As former Defendant Texas Commissioner of Health and Human Services Ladd testified, "preventive care is cost effective. '[I]t is a fact; if you spend more money . . . at an early age, you save money' later." *quoted in id.* at 12.

The children suffered because the officials did not meet their important EPSDT obligations. Many children did "not receive check-ups or other services because they [did] not understand the Medicaid system or what Medicaid covers. Defendants' past methods of informing class members about EPSDT have often been ineffective." Fairness Order at 15; *see* 42 U.S.C. § 1396a(a)(43)(A) (inform all children about EPSDT). Even though many children did not have a doctor to provide screens or other necessary health care, the State officials' "systems for assisting class members to find health care providers did not work well." Fairness Order at 14; *see also*, *Id.* at 30; 42 U.S.C. §§ 1396a(a)(43)(B) & (C) ("arrange" screens and treatment).

The State officials' breach of their EPSDT duties is all the more harmful because "indigent children are more likely to be in ill health than are their more fortunate peers." Fairness Order at 8. For example, anemia and asthma are overrepresented among poor children. *Id.* at 8-9. "[A]s with medical problems, indigent children also have more severe dental problems than other children." *Id.* at 9. Indigent children have not shared in "significant progress recently in eradicating dental disease and

decay among young people in the United States." *Id.* The consequences can be serious, including greater likelihood of "dental emergencies ('swelling, fever, bleeding, pus, pain of dental origin')." *Id.* Finally, "tooth aches and dental disease constitute one of the most — if not the most — common reasons that children miss school." *Id.*

In 1994, the district court certified the case as a class action and considered the State officials' motion to dismiss this case.[2] Although the officials argued that the Eleventh Amendment prohibited suit as to State agencies, they did not urge that the Eleventh Amendment barred prospective relief from the officials themselves. The district court denied the officials' motion to dismiss except as it applied to the State agencies. Order (filed August 10, 1994).[3]

B. After Discovery And Lengthy Negotiations, The Parties Propose The Consent Decree. After extensive discovery, the parties hoped to settle this case. In October 1994, they together proposed a schedule for negotiations. The children and the State officials agreed that all were "negotiating in good faith and that negotiations may resolve this dispute *in a mutually beneficial manner*." Joint Motion Concerning Scheduling at 1 (filed October 14, 1994) (emphasis added). The district court ordered the agreed schedule.

Negotiations were serious, at arm's length, fair and open. Fairness Hearing Transcript 7;2-16 (Petitioner's counsel) ("Fairness TR").[4] As Respondents' counsel explained, "we have

2. The officials filed their motion to dismiss twice, on November 3, 1993 and April 1, 1994.

3. The district court rejected the officials' claim that three of them were not proper *Ex parte Young* defendants because they had little authority to create policy. The court further held that the Medicaid Act's EPSDT provisions create rights that can be enforced through 42 U.S.C. § 1983.

4. When the children quote from the Fairness TR, the page citation(s) precedes the semicolon. The line citation(s) follows the semicolon.

spent several days . . . every week, face to face with very difficult and honest negotiations." *Id.* 13;5-7; *see also*, *Id.* 12;16-19; *Id.* 115;19 to 116;7 (Former Defendant Dr. Koops, Associate Commissioner for Health Care Delivery, Texas Department of Health, in agreement); *Id.* 125;17-21. (Mr. Schmidt, Texas EPSDT Director, in agreement). According to Dr. Koops, all parties "believed in" the negotiations. *Id.* 116;4-5.

In January 1995, after "extensive settlement negotiations," the parties proposed an initial settlement to the district court. Joint Report Concerning the Progress of Settlement Negotiations at 1 (filed January 20, 1995) ("Joint Report Concerning Negotiations"). They reported that the "proposal fairly resolves most of the disputed issues in this case" and listed the issues that remained in dispute. *Id.* at 2-3.

The State officials wished to "inform appropriate legislative and executive offices of the state of the content and potential financial implications of this agreement. The Defendants [did] not feel that they [could] give their final approval until this discussion [took] place." So, the parties requested permission to file a proposed consent decree by June 1, 1995. *Id.* at 4. Later, the parties requested an additional month to continue work on the proposed consent decree, "since the Texas Legislature does not adjourn until May 29, 1995, and the Parties will need some time to assess the result of the legislature's action." Joint Motion to Amend Proposed Settlement Agreement and Notice to Court of Compliance at 1 (filed March 31, 1995).

Negotiations continued for several more months. The State officials had time to obtain approval from the elected officials. They also had time to reconsider the settlement to be sure that it reflected their discretion and judgment. As a result, the parties agreed to changes to the proposed settlement. *Id.* at 1; Fairness Order at 21 ("some differences" between the proposed consent decree and the earlier settlement agreement).

In July 1995, the parties made a final proposal to the district court to settle most issues presented by this litigation. They also noted that disputed issues remained. Joint Report to the Court at 1-2 (filed July 3, 1995).

C. The District Court Approves The Consent Decree, As Urged By The Texas Attorney General. In December 1995, the district court held a day long hearing to decide whether to adopt the proposed settlement as the court's decree. The Texas Attorney General was "delighted" to attend and recommended "that the Court sign this proposed consent decree." Fairness TR 12;16-17 (Opening Argument of Texas Assistant Attorney General Horne).[5] He noted that the decree was negotiated within the framework of federal Medicaid law. *Id.* 13;16-17; *see also*, L.; ¶308. All three of the State officials' witnesses testified in favor of entry of the decree. *Id.* 112-121 (Dr. Koops); *Id.* 122-138 (Mr. Schmidt); *Id.* 138-154 (Ms. Metterauer, EPSDT Director, Southeast Texas).

The district court requested proposed findings of fact and conclusions of law. *Id.* 154;19-20. In their December 26, 1995 response, the officials only objected to specific language that the children proposed for the district court's order. The officials did not object to the district court's ongoing jurisdiction over them or the decree.

In February 1996, the district court entered the settlement as its consent decree. Order to Correct Consent Decree (filed March 11, 1996). The court found that the proposed settlement was "fair, reasonable and adequate." Fairness Order at 1. Fraud and collusion were absent from the negotiations. *Id.* at 22-23. Finally, after reviewing considerable evidence and legal arguments, the district court concluded that it was likely that the "Plaintiffs could have succeeded at trial." *Id.* at 25.[6]

5. Assistant Attorney General Horne was one of the State officials' negotiators. Fairness Order at 21-22.

6. The district court accepted as true all uncontested facts stated in the consent decree. Fairness Order at 4. The facts were supported by testimony. *Id*; Fairness TR27;4-10 (Dr. Moore).

D. The State Officials' Actions After Entry Of The Decree Demonstrate Their Continued Assent To The Order And The District Court's Jurisdiction Over Them.

The officials did not appeal.

Although the officials violated many aspects of the decree, they made some efforts to comply. From July 1996 though May 2002, the State officials reported twenty five times to the district court about their efforts to comply with the decree. L.; ¶¶306-307.[7]

The parties filed three joint motions to modify the decree.[8] Other than the agreed motions, the officials did not file a motion to modify or dissolve the consent decree.[9]

E. The Children's Motion To Enforce The Consent Decree. In the fall of 1998, the children moved to enforce provisions of the consent decree. The officials "readily" admitted to the district court that "some portions of the Decree directly relate to the Federal statutory scheme for the EPSDT program. . . ." Defendants' Post-Trial Brief and Proposed Findings of Fact at 5 (filed May 31, 2000). They conceded that EPSDT "entitlements can be enforced by Federal Courts who

7. The officials filed their reports on 1) May 13, 1996 (as allowed by the district court), 2) July 26, 1996, 3) October 25, 1996, 4) February 3, 1997, 5) May 19, 1997, 6) July 31, 1997, 7) November 17, 1997, 8) February 11, 1998, 9) May 11, 1998, 10) August 13, 1998, 11) November 30, 1998, 12) February 26, 1999, 13) May 17, 1999, 14) August 16, 1999, 15) November 12, 1999, 16) April 28, 2000 (for January), 17) April 28, 2000 (for April), 18) August 14, 2000, 19) November 20, 2000, 20) February 7, 2001, 21) May 17, 2001, 22) August 3, 2001, 23) November 16, 2001, 24) February 19, 2002, and 25) May 24, 2002.

8. Joint Motion for Approval of Agreement to Increase Reimbursement for Meals (filed March 31, 1997); First Joint Motion to Modify Paragraph 35 of the Consent Decree: Schedule for Medical Check Ups (filed January 31, 2000). Joint Motion to Modify Paragraph 19 of Consent Decree (filed October 18, 2000) (concerning outreach). The district court granted the motions.

9. The court of appeals incorrectly found that the district court refused to modify the consent decree. Pet. App. at 3a.

have authority to prospectively enjoin State officials for violating those rights." *Id.* at 11; *see* Pet. App. 247a-248a.

Nonetheless, the officials argued that the Eleventh Amendment barred the district court from enforcing the decree provisions raised in the children's motion. They argued that "the Court has jurisdiction to impose a remedy only when it finds that class members' federal rights have been violated by a defendant's failure to properly implement a provision of the consent decree." Defendants' Pre-Trial Brief at 3 (filed March 9, 2000); *citing Lelsz v Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987) (*Lelsz I*), *reh'g en banc denied*, 815 F.2d 1034 (*Lelsz II*), *subsequent panel decision*, 824 F.2d 372 (*Lelsz III*), *cert. dismissed*, 483 U.S. 1057 (1987).

F. The District Court's Memorandum Opinion And Remedial Order To Enforce The Consent Decree. Following full briefing and a five-day hearing in March 2000, the district court issued its memorandum opinion and remedial order. Pet. App. 54a; 276a.

1. Jurisdiction To Enforce The Decree. The district court decided that it had jurisdiction to enforce the decree despite the officials' sovereign immunity claims. Pet. App. 245a-275a. First, the court concluded that this case falls within the *Ex parte Young* exception to the Eleventh Amendment because it seeks prospective relief from State officials' violation of federal law. Pet. App. 246a n.197. Second, the district court noted that the State officials did not object to the entry of the consent decree. Pet. App. 247a.

Third, the district court addressed the court of appeals' decision in *Lelsz*, which concludes that the Eleventh Amendment prevents enforcement of a consent decree based on State law. 807 F.2d 1243, 1247, *citing Pennhurst State School and Hosp. v Halderman*, 465 U.S. 89 (1984). The district court decided that *Lelsz* does not bar enforcement of the decree in this case because the consent decree is not based on state law. Pet. App. 260a.

Since "the decree provisions at issue bear a clear relationship to federal law," *id.*, the district court referred to *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) instead of *Lelsz*. Pet. App. 256a n.199. *Rufo* envisions "the enforcement of a decree that includes more than the mere recitation of federal law, as 'almost any affirmative decree beyond a directive to obey [federal law] necessarily does that.'" Pet. App. 256a n.199, *quoting Rufo*, 502 U.S. at 389.

To determine that it had jurisdiction to enforce the consent decree provisions at issue, the district court applied this Court's analysis in *Firefighters v City of Cleveland*, 478 U.S. 501, 519-525 (1986). *Firefighters* establishes a three-pronged test for whether a consent decree may be entered:

> [T]o sustain federal court jurisdiction to approve a consent decree against state officials, the remedies in the decree must only serve to: 1) resolve a dispute within the court's subject matter jurisdiction, 2) come within the general scope of the case made by the pleadings, and 3) further the objectives of the law upon which the complaint was based.

Pet. App. 247a, *citing*, *Firefighters*, 478 U.S. at 525.

Since "each provision falls squarely within the parameters outlined in *Firefighters*," the district court concluded that the provisions "may be enforced against defendants." Pet. App. 261a. First, the court found that it could enforce the decree's requirement for effective outreach. L.; ¶¶32, 52. "Decree provisions which obligate defendants to inform 'effectively' . . . further the objectives of" the statutory requirement that the State officials inform all of the children about EPSDT. Pet. App. 264a. The State officials must inform all Medicaid recipients under the age of 21 "of the availability of early and periodic screening, diagnostic and treatment services . . . and the need for age-appropriate immunizations against vaccine-preventable diseases." 42 U.S.C. § 1396a(a)(43)(A).

After reviewing evidence of the problems that the children face obtaining medical screens, the court found that it could enforce the decree's requirements concerning check ups. The "defendants may be held in violation of decree requirements regarding the provision of services upon request where they have failed to provide class members with the information necessary to make such requests." Pet. App. 266a. The court also concluded that it could enforce requirements for dental services and case management. *Id.* L.; ¶2, 3, 143, 212, 248, 264, 281.

Third, the court found that it could enforce the decree's managed care requirements concerning check ups and treatment. L.; ¶¶190, 192. The State officials' managed care program uses several financing models to control the children's access to health care. Through health maintenance and similar organizations (HMOs), the State officials require the children to receive care through one primary care provider, who may treat them directly or approve referrals to a limited networks of specialists. Pet. App. at 130a-131a.

Decree provisions about services in managed care appropriately give "special emphasis to [the children's] entitlements in light of the potential problems posed by the implementation of managed care." Pet. App. 267a-268a. Although federal law permits the officials to implement managed care, 42 U.S.C. § 1396u-2, the officials must "utilize managed care to meet their obligations under the federal EPSDT statute; . . . [The Medicaid Act's managed care provisions do] not free them from those obligations, or limit their responsibilities to managed care enrollees." Pet. App. 267a.

The court concluded that it could require the officials to provide data and reports required by the decree. L.; ¶¶191, 273-280, 284, 289, 293, 295. "[T]he collection of data furthers the objectives of the EPSDT statute, which is to improve the health of poor children. That objective cannot be accomplished without constant and rigorous review of the program's accomplishments and shortcomings." Pet. App. 270a-271a.

The district court enforced the decree's requirements for training of professionals because of the demonstrated "causal connection between the increased knowledge of providers and other personnel and the access to and receipt of services by the plaintiff class." Pet. App. 274a. L.; ¶¶104, 107-108, 112-114, 117-120, 124-130, 194.

Finally, the district court enforced the decree's requirements for toll-free numbers, which are part of the officials' efforts to inform the children about EPSDT and to "provide or arrange" screens and other services for them. 42 U.S.C. §§ 1396a(a)(43)(A); (B); (C). Pet. App. 274a. L.; ¶247.

2. State Officials Violated The Decree. The memorandum opinion also concludes that the State officials were violating most of the decree provisions cited by the children. The record is filled with examples of children who could not obtain required EPSDT services. A two-year old with cerebral palsy could not even hold his head up — let alone walk — because he did not receive proper physical therapy. Pet. App. 163a-164a (Nurse Lloyd). A seven-year old was about to be placed in special education because — for want of a hearing test to diagnose his deafness — he was incorrectly perceived to have learning disabilities. Pet. App. 88a n.32; Decree Enforcement Hearing Transcript II-171;4 to 172;22 ("Enforcement TR") (Nurse Singleton).[10]

Other evidence also shows that the decree was violated. Even though officials have expanded their outreach efforts, their information program still falls short. Pet. App. 59a-83a. Although the children are entitled to information about EPSDT, 42 U.S.C. § 1396a(a)(43)(A), "[o]verwhelming evidence . . . demonstrat[es] that large numbers of class members" lack information about the program. Pet. App. 61a. Further, "a poor and often isolated population should not be robbed of their rights

10. When the children refer to the Enforcement TR, they refer to the volume number by Roman numeral. The page citation(s) precedes the semicolon. The line citation(s) follows the semicolon.

to services upon request when they have not been informed of those rights." Pet. App. 111a; 42 U.S.C. § 1396a(a)(43)(B) (screens).

Despite the officials' claims that their managed care program would improve the children's access to high quality health care, Pet. App. 133a, the reverse has been the case. Fewer children even get basic medical screens in managed care than without it. Pet. App. 139a-141a. Even when children get screens in managed care, those screens are often "grossly inadequate and incomplete." Pet. App. 141a. For example, young children in managed care frequently lack immunizations or blood tests for lead poisoning, even though "Congress has recognized the importance of immunizations and blood tests for lead poisoning by requiring that they be mandatory checkup elements." Pet. App. 142a n.86, *see also*, *id.* 142a-143a; 42 U.S.C. §§ 1396d(r)(1)(B)(iii) (immunizations); 1396d(r)(1)(B)(iv) (lead tests).

Managed care raises significant barriers that prevent the children from receiving medical treatment that they need. Pet. App. 144a-160a. For example, one youth had to wait eight weeks for orthopedic care for a broken arm. Pet. App. 149a n.98, Enforcement TR II-199;4-16 (Nurse Singleton). Children in managed care cannot get even emergency care for severe and prolonged asthma attacks of a critical nature, or dangerous episodes of vomiting and fever that result in dehydration requiring intravenous fluids. Pet. App. 157a-158a (C.H., mother of three class members).

Finally, despite improvements — including increased rates of dental screens — more than one million children still get no dental care at all. Pet. App. 92a. As a result, children "crowd emergency rooms in hospitals, suffering from acute forms of dental disease that, while easily preventable, often lead to such health complications as serious oral infections, dehydration, fever and malnourishment stemming from the inability to eat." Pet. App. 91a.

G. The District Court's Forward-Looking Remedial Order Accommodates The Officials' Exercise Of Discretion. The district court chose a mild remedial approach to the decree violations. The court accommodated the officials' discretion by allowing them to propose "corrective action plans to remedy each violation of the decree." Pet. App. 276a-277a. As with the decree itself, the district court's remedial order provides only prospective relief.

The officials appealed.[11]

H. The Court Of Appeals' Decision. Although the Fifth Circuit noted that the record shows "unmet medical needs of children in Texas," Pet. App. 3a, the court found that the Eleventh Amendment deprived the district court of jurisdiction to enforce the decree. Pet. App. 13a *et seq*. On July 24, 2002, the court of appeals vacated the district court's orders and remanded for further proceedings. Pet. App. 46a.

1. According To The Fifth Circuit, The Officials Did Not Waive The Eleventh Amendment. The court of appeals held that the State officials did not waive Eleventh Amendment immunity by urging the district court to enter the consent decree. Pet. App. 39a-42a. The State officials did not unequivocally waive sovereign immunity because 1) the decree "states in paragraph 301 that 'Defendants do not concede liability;'" *id.* at 41a, 2) before and after asking the district court to enter the consent decree, the officials raised the Eleventh Amendment, and 3) the officials are defendants in this case, not plaintiffs.

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11. A second interlocutory appeal before the court of appeals concerned the children's first supplemental complaint. It asserts two new claims about the officials' failure to provide dental care as required by the Medicaid Act. 42 U.S.C. §§ 1396a(a)(8); 1396a(a)(30)(A). After supplementing the complaint, Pet. App. 52a, the district court denied the officials' motion to dismiss. Pet. App. 48a. The court of appeals vacated the denial of the motion to dismiss. Pet. App. 46a.

2. According To The Court Of Appeals, A Consent Decree Can Be Enforced Only If A Decree Violation Is Also A Violation Of Federal Rights. The Fifth Circuit relied on its controversial *Lelsz* decision instead of applying the *Rufo/ Firefighters* test to determine whether the decree could be enforced. Pet. App. 24a-27a; *see Rufo*, 502 U.S. at 389-390; *Firefighters*, 478 U.S. at 525. The court extended *Lelsz*' reasoning to hold that the Eleventh Amendment bars enforcement of a consent decree against State officials even if the decree is based on federal law. The Eleventh Amendment requires the district court to "'fall back on its inherent jurisdiction'" to enforce a consent decree against State officials. Pet. App. 24a. "Before the district court can remedy a violation . . . of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. 27a-28a.

This Court granted the children's petition for a writ of certiorari on March 10, 2003.

SUMMARY OF ARGUMENT

The Eleventh Amendment cannot mean that State officials may urge a federal court to enter a consent decree based on federal law and later urge that sovereign immunity bars enforcement of the order that they urged the court to enter. If given this meaning, the Eleventh Amendment and sovereign immunity would be trivialized, the judiciary's integrity would be impugned and unfairness would result.

When State officials waive immunity by agreeing to a consent decree, they must not be allowed to later urge that the very same immunity bars the district court from enforcing the agreed decree. The Eleventh Amendment does not bar a court from "administering relief" when the court is "acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction." *Gunter v Atlantic Coast Line R. Co.*, 200 U.S. 273, 292 (1906). This is particularly true when, as in this case, the decree 1) is based on federal law, 2) creates "mandatory,

enforceable" obligations and 3) allows a return to court to resolve disputes about decree compliance. It would be anomalous, inconsistent and unfair for State officials "both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Lapides v Bd. of Regents of Univ. System*, 535 U.S. 613, 619 (2002).

If it is solely up to State officials whether to comply with agreed decrees, there will be no incentive for plaintiffs to agree. Plaintiffs and State officials will lose the option to choose consent decrees — a remedy which is available to all other litigants.

The ability to waive immunity is an important aspect of sovereignty. The sovereign's personal privilege to waive immunity predates our nation's founding and has continued unabated until the present. *Alden v Maine*, 527 U.S. 706, 715-716, 724 (1999).

When properly authorized State officials voluntarily choose to enter into a consent decree, they waive sovereign immunity by invoking the federal court's jurisdiction. This happened in this case because the State officials' conduct was active, voluntary, clear and authorized. *See*, *Lapides*, 535 U.S. at 620-624.

It is important for State officials to be able to waive sovereign immunity to enter into consent decrees. Eleventh Amendment sovereign immunity is designed to protect the States' dignity and ability to make independent decisions concerning policy and the administration of their own affairs. Being able to enter into consent decrees protects the States' dignity by letting them choose to avoid the spectacle of trial. Since State officials incorporate their discretion into agreed consent decrees, consent decrees give those officials a degree of control over how to comply with federal law and how to

administer important programs. Finally, consent decrees grant to State officials the flexibility to agree to resolve parts of a case even if they cannot agree to resolve the entire dispute.

It would impugn the federal court's integrity if the court of appeals' rule becomes the law of the land. Federal courts should not be put in the awkward position of expending time and effort to decide whether to approve and enter consent decrees, only to face the State officials' claim that sovereign immunity prevents enforcement. The district courts should not have to make difficult jurisdictional rulings every time a party seeks to enforce a consent decree against State officials.

State officials must not have free rein to ignore validly entered orders. A court needs to be able to enforce its own orders so it can "function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v Guardian Life Ins.*, 511 U.S. 375, 380 (1994). Even federal injunctions that are subject to substantial constitutional question must be obeyed unless modified or dissolved.

Second, even if the officials did not waive sovereign immunity, the district court had jurisdiction to enforce the consent decree because of the *Ex parte Young* exception to the Eleventh Amendment. *Ex parte Young* is critical to our constitutional design because "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v Mansour*, 474 U.S. 64, 68 (1985).

This is a classic *Ex parte Young* case because the children's "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. v Pub. Serv. Comm'n.*, 535 U.S. 635, 645 (2002). The Eleventh Amendment does not bar enforcement of the consent decree in this case because "*Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits." *Puerto Rico Aqueduct v Metcalf & Eddy*, 506 U.S. 139, 146 (1993).

The Eleventh Amendment permits consent decree enforcement against State officials whether or not their violation of the decree also violates a federal right. First, when a federal court has subject matter jurisdiction over claims, Eleventh Amendment analysis does not inquire into the merits of the case or whether rights have been violated. *Verizon*, 535 U.S. at 642-643, 645-646. Second, it would unduly restrict federal courts' proper equitable powers to prohibit enforcement of decrees unless violation of the decree is the same as violation of a right. "[T]o save themselves the time, expense and inevitable risk of litigation, . . . [State officials] could settle the dispute . . . by undertaking to do more than [federal law] itself requires." *Rufo*, 502 U.S. at 389 (*quotation omitted*). Third, consent decrees by their very nature further the important goal of respecting State officials' discretion, as is required when federal courts craft injunctions by court order instead of by agreement. *Milliken v Bradley*, 433 U.S. 267, 280-281 (1977). It does not make sense for federal courts to lack jurisdiction to enforce consent decrees, which already incorporate State officials' exercise of discretion. It especially does not make sense in this case, because — by requesting the officials' remedial proposals — the district court took extra efforts to respect the State officials' judgment about how to come into compliance with the decree.

It would be contrary to principles of sound judicial administration to require plaintiffs to prove that violation of a consent decree also violates a federal right before a decree can be enforced. Settlement favors both plaintiffs and defendants — as well as courts that need not proceed to trial. But, the court of appeals' rule means that plaintiffs have to prove their case on the merits — that their rights have been violated — to enforce a consent decree. This rule removes any incentive for plaintiffs to agree to consent decrees in cases that involve State official-defendants. If plaintiffs will not agree, State officials will lose the remedial option of consent decrees. More cases will go to trial, and federal courts will be forced to intrude more into the

affairs of States than they would if consent decrees were a practical option for resolving these complex disputes.

There is a better way. If a federal court can properly enter a consent decree urged by State officials, it should also be able to enforce that decree. To be properly entered, a consent decree "must (1) 'spring from and serve to resolve a dispute within the court's subject matter jurisdiction'; (2) 'come within the general scope of the case made by the pleadings'; and (3) 'further the objectives of the law upon which the complaint was based.'" *Firefighters*, 478 U.S. at 525.[12] The decree in this case — which the State officials helped to craft — complies with the three *Firefighters* elements. The district court was correct to enforce it in the face of the officials' serious decree violations.

ARGUMENT

I. WHEN STATE OFFICIALS ACTIVELY URGE A FEDERAL COURT TO ENTER A CONSENT DECREE THAT 1) SPECIFICALLY PROVIDES FOR THE FEDERAL COURT'S ONGOING SUPERVISION OF DECREE COMPLIANCE AND 2) BY ITS OWN TERMS CREATES "MANDATORY, ENFORCEABLE" OBLIGATIONS, THEY WAIVE SOVEREIGN IMMUNITY FROM DECREE ENFORCEMENT.

For centuries, the sovereign has been able to consent to suit. The sovereign's immunity from suit "*without its consent*" was "well established in English law" and "universal in the States when the Constitution was . . . ratified." *Alden*, 527 U.S. at 715-716 (emphasis added).

Throughout their debates, the founders noted that our new nation would maintain the doctrine of sovereign immunity, including the sovereign's age-old ability to consent to suit. *Alden*, 527 U.S. at 716-718. As Alexander Hamilton stated, "[i]t is inherent in the nature of sovereignty not to be amenable

12. *Firefighters'* first factor assures that federal courts only enter decrees in cases where subject matter jurisdiction exists. As a result, federal courts will also only enforce consent decrees in cases where jurisdiction is proper.

to the suit of an individual *without its consent*." The Federalist No. 81 at 487-488, *quoted in Alden*, 527 U.S. at 716 (emphasis in The Federalist original). James Madison "echoed" the same point. *Id.* at 717. If a citizen files suit in federal court "and *if a state should condescend to be a party*, [a federal] court may take cognizance of it." 3 J. Elliot, Debates on the Federal Constitution 533 (2d ed. 1854), *quoted in Alden*, 527 U.S. at 717 (emphasis added).

In *Hans v Louisiana*, this Court once again recognized that "[*u*]*ndoubtedly a State may be sued by its own consent.*" 134 U.S. 1, 17 (1890) (emphasis added). "The suability of a State *without its consent* was a thing unknown to the law." *Id.* at 16 (emphasis added). Indeed, "[t]he immunity from suit belonging to a State . . . is a *personal privilege which it may waive at pleasure*." *Clark v Barnard*, 108 U.S. 436, 447 (1883) (emphasis added). In sum, this Court "ha[s] not questioned the general proposition that *a State may waive its sovereign immunity*." *Alden*, 527 U.S. at 737 (emphasis added).

It is important for State officials to be able to waive immunity to agree to consent decrees. "[S]ettlements rather than litigation will serve the interests of plaintiffs *as well as defendants*." *Evans v Jeff D.*, 475 U.S. 717, 733 (1986), *quoting Marek v Chesney*, 473 U.S. 1, 10 (1985) (emphasis added). State officials must be able to waive immunity to settle litigation or else they would "be deprived of the opportunity to avoid 'an expensive and protracted contest and the possibility of an adverse and disruptive adjudication.'" *Lawyer v Dep't. of Justice*, 521 U.S. 567, 574 (1997).[13]

13. State officials may waive immunity from one part of litigation. For example, their litigation conduct may waive immunity from compulsory counterclaims even if it does not waive immunity from other possible counterclaims. *Regents of the University of New Mexico v Knight*, 321 F.3d 1111, 1125-1126 (Fed. Cir. 2003).

In the context of settlement, this flexibility is important to preserve State officials' ability to exercise discretion. They should be able to waive

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Immunity is designed to protect the States' dignity. *Alden*, 527 U.S. at 714-715. Immunity must not be misinterpreted to require a State to submit to the indignity of trial and possibly being found in violation of federal law when the State itself prefers to avoid this spectacle. In addition, immunity should not prevent a State from choosing to avoid the expense of trial, in terms of dollars, time and risk.

Further, sovereign immunity is designed to protect the States' ability to make independent decisions concerning policy and the administration of their own affairs. *Alden*, 527 U.S. at 713. The decision to settle "institutional reform" litigation by consent decree is in itself an important policy decision; it permits State officials to infuse the agreed decree with their judgment about how to administer an important program. It also gives them a degree of control over the terms of the remedy and permits them to avoid the unpredictable results of a judicially crafted injunction if the plaintiffs prevail. The Eleventh Amendment must not be misinterpreted to deprive State officials of the option to make this policy choice.

Moreover, the process of negotiation allows the officials time to consult with other important State policy-makers before reaching a final agreement, so the State's internal decision-making process is respected. In this case, the officials had many months to consult with members of the legislature and other officials before finalizing the decree. The process of trial and a judicially created remedy is not so accommodating.

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immunity to agree to an enforceable consent decree that resolves parts of a case while leaving other parts of the case in dispute. In fact, this is exactly what happened in this case. Joint Report to the Court at 1-2 (reserving disputed issues).

A. State Officials Waive Sovereign Immunity From Decree Enforcement By Voluntary, Clear Litigation Acts That Invoke The Court's Jurisdiction. Litigation conduct may waive Eleventh Amendment immunity. In *Gardner v State of New Jersey*, 329 U.S. 565 (1947), New Jersey filed a proof of claim to recover taxes from a bankrupt railroad. Later, the State's Attorney General urged that sovereign immunity barred the bankruptcy court from hearing objections to the claim. Immunity was no bar because it had been waived. "When the State becomes the actor . . . it waives any immunity it otherwise might have had respecting the adjudication." *Id.* at 574; *see also*, *College Sav. v Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999); *Clark*, 108 U.S. at 447.

More recently, this Court decided that the act of removal to federal court waives sovereign immunity, even from claims made only under State law. In *Lapides*, 535 U.S. 613, Professor Lapides filed suit in a Georgia state court against the Georgia State University System and university officials. All of the defendants, including the State University, removed the case to federal court. The clear and voluntary act of removal waived the State's claim of sovereign immunity because it "invoked the federal court's jurisdiction." *Id.* at 620.

Further, when a State waives immunity by litigation conduct, it cannot change its mind later. *Lapides*, 535 U.S. at 619. "This is the situation in which law usually says a party must accept the consequences of its own acts." *Wisconsin Dept. of Corrections v Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring). For example, in *Gunter*, a federal court enjoined South Carolina officials from taxing railroad property. 200 U.S. 273, 282, 291 (1906). Although the State officials did not claim immunity from the original proceedings, *id.* at 287-289, they later claimed that the Eleventh Amendment barred the court from enjoining them from taxing. *Id.* at 291. Their argument failed because once a State waives immunity, "it will be bound

thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Id.* at 284.

B. In This Case, Litigation Conduct Waived Sovereign Immunity As To Decree Enforcement. Four factors determine whether litigation conduct waives sovereign immunity. The first three factors are whether State officials 1) take active steps to invoke federal jurisdiction, thereby waiving sovereign immunity, *Lapides*, 535 U.S. at 620; *Gardner*, 329 U.S. at 574, 2) voluntarily waive immunity, *Clark*, 108 U.S. at 447, and 3) take actions that clearly invoke federal jurisdiction, thereby waiving immunity, *Lapides*, 535 U.S. at 620. The fourth factor is whether there is proper authority to waive immunity. *Id.* at 621-623. Each factor is present in this case.

1. The Officials Actively Pursued The Decree. The consent decree was a long time coming. Over the course of many months, the State officials' actions demonstrated their active consent to the decree and the district court's jurisdiction over them *vis a vis* decree compliance. By becoming "actor[s, State officials waive] any immunity [they] otherwise might have had respecting" the consent decree. *Gardner*, 329 U.S. at 574.

Even the decision to begin negotiations actively involved the officials. In October 1994, the children and the State officials together urged the district court to permit settlement negotiations.

Negotiations were serious, at arm's length, fair, open and honest. Fairness TR 7;2-16; *id.* 13; 5-7; *see also*, *id.* 12;16-19; *id.* 115;19 to 116;7 (Dr. Koops, in agreement); *id.* 125;17-21. (Mr. Schmidt, in agreement). All parties, including the officials, "believed in" the negotiations. *Id.* 116; 4-5 (Dr. Koops).

The parties together proposed to the court an initial settlement in January 1995. The State officials could not finally propose a settlement then, however, because they believed that they needed approval from various State legislators and officials.

Joint Report Concerning Negotiations at 4. Later, the parties even requested an enlargement of the deadline for negotiations so that they would have time to review relevant legislative action after the session ended.

After approval had been obtained and several revisions to the proposed settlement had been made, the parties proposed the consent decree to the district court in July 1995. The proposal stated that "the parties may request relief from this Court" from decree violations. L.; ¶303. The parties and their lawyers all ". . . hope[d] that the Court will sign the Decree. . . ." Joint Report to the Court at 1.

In December 1995, the Attorney General recommended "that the Court sign this proposed consent decree." Fairness TR 12;17 (opening statement of Assistant Attorney General). The State officials' witnesses all testified in favor of the decree. *Id.* 112-121 (Dr. Koops); *Id.* 122-138 (Mr. Schmidt); *id.* 138-154 (Ms. Metterauer).

The district court waited to enter the decree as its order until February 1996 — more than fifteen months after negotiations had begun in 1994. The State officials had enough time to thoughtfully and carefully determine whether or not to agree to the consent decree.

The officials chose the decree. Without their active involvement, the decree never would have been before the district court. "By electing to . . . [urge entry of the decree, the officials] . . . created the difficult problem confronted in the Court of Appeals and now here." *See Schacht*, 524 U.S. at 393 (Kennedy, J., concurring).[14]

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14. Before negotiations began and settlement was reached, the officials defended against the claims raised in this case. For example, they filed their motion to dismiss twice.

After the parties agreed to the consent decree, the officials' actions changed. Their actions are further evidence that the officials consented to the decree.

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2. Waiver Was Voluntary. By voluntarily invoking the district court's jurisdiction, the State officials waived any immunity from decree enforcement that they may have had. "[T]he *voluntary nature* of a consent decree is its *most fundamental characteristic.*" *Firefighters*, 478 U.S. at 521-522 (emphasis added).

Since the "parties' consent animates the legal force of a consent decree," *id.* at 525, the State officials were "under no compulsion" even to negotiate with the children. *See Schacht*, 524 U.S. at 395-396 (Kennedy, J., concurring.). Once negotiations began, the officials had the "unilateral right to block" the agreement that resulted in the decree. *Id.*

Instead of blocking the agreement, the officials embraced it. During the district court's hearing to decide whether to adopt the decree, the Assistant Attorney General who participated in settlement negotiations was "delighted to be here today," and recommended "that the Court sign this proposed consent decree." Fairness TR12; 16-17; Fairness Order at 1.

Further, the State officials had other options. At the most Draconian extreme, they could have urged that Texas decline federal Medicaid funds, so that there would have been no need

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After the hearing to determine if the proposed consent decree should be entered, the officials ignored another opportunity to raise Eleventh Amendment concerns. In response to the district court's request for proposed findings of fact and conclusions of law, the officials did not object to the district court's ongoing jurisdiction over them or the decree.

The officials did not appeal from the order that adopted the consent decree, as would have been expected if they had disagreed with the decree's entry. In addition, from July 1996 though May 2002, the State officials reported twenty five times to the district court about their efforts to comply with the decree. L.; ¶¶306-307.

Finally, the parties filed three joint motions to modify the decree, further indicating that the State officials assented to the district court's ongoing jurisdiction over them and the decree.

to comply with federal requirements. *Wilder*, 496 U.S. at 502; *cited with approval in Gonzaga*, 536 U.S. at 280, 289 n.6.

The officials had other litigation options available to them. They could have opted for trial instead of settlement. *Lawyer*, 521 U.S. at 580. They could have agreed to the decree under protest, by "express agreement reserving the right to appeal." *See*, 15A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3902 at 95 (2d Ed. 1992). Or they could have attempted to reach a settlement contract instead of an enforceable consent decree. If this case had been disposed of by a settlement agreement and a dismissal order that did not retain the district court's ongoing jurisdiction over the case, we might not be here today. *See Kokkonen*, 511 U.S. at 381-382.

The officials did not choose any of these routes. They chose to invoke the federal court's jurisdiction by urging entry of the decree. What did they obtain in exchange for the decree and its waiver of sovereign immunity? They avoided trial and a finding of liability, and maintained the ability to seek waivers of Medicaid requirements. L.; ¶¶ 301, 308. They obtained a consent decree that incorporates their judgment about how to administer EPSDT. They avoided an injunction crafted by a district court that might not share their experience with health care for indigent children or their views about program administration. Finally, they obtained an order that protects them from further suit by other class members concerning the same issues because "[a]ll members of the class . . . are bound by the judgment." 5 Newberg on Class Actions § 16.20 at 226 (4th Ed. 2002).

a. State officials can voluntarily waive immunity even though they are defendants. State officials can waive Eleventh Amendment immunity even if they are defendants. *Gunter*, 200 U.S. at 289, 292. Even though the State of Georgia was involuntarily brought into a case as a defendant, it consented to suit in federal court by agreeing to removal. *Lapides*, 535 U.S. at 620. The State officials' mere status as defendants does not

defeat their voluntary invocation of the federal court's jurisdiction, which waived the Eleventh Amendment.

b. The officials' assertion of sovereign immunity before or after they waived it does not defeat their waiver of the Eleventh Amendment's protections as to decree enforcement. The State officials' pursuit of decree entry waived sovereign immunity even though they "repeatedly raised in the district court an Eleventh Amendment defense to the enforcement of the decree." Pet. App. 41a. Indeed, the officials' earlier assertion of the Eleventh Amendment actually shows that the officials and their lawyer knew about the concept of sovereign immunity. They argued that the Eleventh Amendment barred pursuit of this case as to the State agency defendants. Even though they knew that immunity existed, the officials waived it with regard to the decree and its enforcement. Their waiver was knowing and voluntary. *See College Sav.*, 527 U.S. at 682, *citing Johnson v Zerbst*, 304 U.S. 458, 464 (1938).

In *Lapides*, as here, the State defendant sought the Eleventh Amendment protection that it had earlier disavowed. 535 U.S. at 616. *Lapides* rightly prohibited the defendant from reasserting the Eleventh Amendment immunity that it already had waived. The children urge the Court to follow *Lapides*' reasoning in this case.

3. Waiver Was Clear And Unequivocal. To invoke federal jurisdiction and waive immunity, litigation conduct must be "clear." *Lapides*, 535 U.S. at 620. The officials' conduct in this case is unequivocal. *See Schacht*, 524 U.S. at 397 (Kennedy, J., concurring). First, all of the officials' witnesses and their lawyer supported entry of the decree.

Second, the officials agreed to a decree that expressly permits further federal court proceedings concerning decree compliance. The decree explicitly "contemplates that Defendants' future activities will comport with the terms and

intent of this Decree. If this proves to be incorrect, the *parties may request relief from this Court*." L.; ¶303 (emphasis added).[15]

Third, the terms of the decree itself demonstrate that the "court had acquired jurisdiction with the assent of . . . [the officials] . . . to determine . . . the controversy presented" about the officials' failure to comply with the consent decree. *See Gunter*, 200 U.S. at 292. As is often true with consent decrees, the State officials urged entry of an order that retains the district court's jurisdiction and allows the parties to return to the district court to resolve disputes. *See*, *Kokkonen*, 511 U.S. at 381-382. The parties may "request relief from [the] Court" in the event of disputes about the officials' compliance with the order. L.; ¶303. The term "will," used throughout the decree, "creates a mandatory, *enforceable obligation*." L.; ¶302 (emphasis added). By asking the district court to enter an order that includes those terms, the officials expressly asked the court to enter an order that envisions a return to court to enforce obligations if disputes arise. The officials submitted to the district court's authority to resolve future decree compliance disputes. *See*, *Gardner*, 329 U.S. at 574. The officials clearly relinquished immunity from being haled back into the very court that they had asked to enter the order in the first place.

The officials and their lawyer did not merely urge the district court to accept a settlement. By urging the district court to enter the settlement *as a consent decree*, the officials urged the district court to enter a judgment of the court. *See*, *Rufo*, 502 U.S. at 374-375. The difference is important. Unlike a mere settlement, a consent decree embodies "an agreement that the parties desire and expect will be reflected in, and be *enforceable as, a judicial decree that is subject to the rules generally applicable to other*

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15. When the clarity of litigation conduct is at issue, State officials need not specifically state that they "waive the Eleventh Amendment" or that they "waive sovereign immunity." The act of removal waives sovereign immunity, without mention of the Eleventh Amendment or immunity. *Lapides*, 535 U.S. at 620.

judgments and decrees." *Rufo*, 502 U.S. at 378 (emphasis added).[16]

The district court might not have jurisdiction if the parties had merely agreed to a settlement contract. But the district court does have jurisdiction to enforce the decree in this case. Not only does the decree incorporate the terms of the agreed settlement; it also sets out the terms of the settlement in the consent order itself and specifically retains the court's jurisdiction over decree compliance. *See*, *Kokkonen*, 511 U.S. 375.

The State officials could "surely anticipate" that the children would return to the district court if they believed that the officials had violated the decree. *See*, *Knight*, 321 F.3d at 1126. The decree's plain language, *see*, *United States v Armour*, 402 U.S. 673, 683 (1971), clearly shows that the parties agreed to an order that preserves the district court's ongoing jurisdiction to resolve disputes about compliance. L.; ¶303. It is fair to hold the officials to the terms of their bargain.

Finally, the officials clearly waived immunity from decree compliance proceedings in *federal* court, where the case was filed and the decree was entered. The decree allows the parties to "request relief from *this Court*" to resolve decree compliance disputes. L.; ¶303 (emphasis added). *See*, *in contrast*, *College Sav.*, 527 U.S. at 676, *citing Smith v Reeves*, 178 U.S. 436, 441-445 (1900) ("[A] State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.")

a. The court of appeals applied the wrong legal test to determine clarity of waiver. The court of appeals incorrectly held that the State officials did not unequivocally waive the Eleventh Amendment. Pet. App. 41a. The court erred by applying the wrong test. "*College Savings Bank* . . . distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct. . . . The relevant 'clarity' here

16. The *Rufo* defendants included a State official. 502 U.S. at 372.

must focus on the litigation act . . . that creates the waiver." *Lapides*, 535 U.S. at 620. In this case, the officials clearly invoked the federal court's jurisdiction by asking the court to enter a decree that specifically allows a return to court to resolve disputes about decree compliance. L.; ¶303.

b. The State officials' denial of liability in the decree does not defeat their waiver of immunity. The court of appeals incorrectly held that the State officials did not unequivocally waive the Eleventh Amendment because "[t]he consent decree expressly states in paragraph 301 that 'Defendants do not concede liability.'" Pet. App. 41a. Disclaimers of this type are common in settlement agreements. *See*, *Suter v Artist M.*, 503 U.S. 347, 354 n.6 (1992).

The court of appeals erred because the officials' refusal to admit liability is not the same as asserting sovereign immunity. When it applies, the Eleventh Amendment provides immunity from suit — not "a mere defense to liability." *Mitchell v Forsyth*, 472 U.S. 511, 526 (1985); *see also Puerto Rico*, 506 U.S. at 146. Since decree terms must be given their natural meanings, *Armour*, 402 U.S. at 678, including "technical meaning[s]," *United States v ITT Continental Baking*, 420 U.S. 223, 238 (1975), the court of appeals should have concluded that the parties meant what they said. While the officials did not concede liability, they *did* agree to a decree that created enforceable obligations and that reserved to the district court the power to resolve disputes about compliance. L; ¶¶302; 303.

4. The Texas Attorney General Has Authority To Waive Eleventh Amendment Immunity During Litigation. Federal law determines "whether a particular set of state laws, rules or, activities amounts to a waiver of the State's Eleventh Amendment immunity." *Lapides*, 535 U.S. at 623; *see also*, *Gunter*, 200 U.S. at 287-289. If State law authorizes the State's Attorney General to represent the State in court, the Attorney General's litigation conduct can waive the Eleventh Amendment's protections. *Lapides*, 535 U.S. at 622. This is

true even if State law "does not authorize the attorney general to waive the State's Eleventh Amendment immunity." *Id.* at 621-623.

As in *Lapides*, Texas' Attorney General has authority to represent the State and State employees in court. Tex. Const. Art. IV, § 22.[17] The Attorney General also has authority to "propose a settlement agreement" to the court. *Terrazas v Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991).[18] The authority to propose a settlement is particularly significant in this case because one action that waived sovereign immunity was the Attorney General's active request for the entry of the consent decree.

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17. During every legislative session since this case began, the Texas legislature has confirmed the Texas Attorney General's authority to represent the State and its employees and to engage is "appropriate pre-trial . . . actions." 1993 TEX. GEN. LAWS, 4564, Goal A.1.1 (73rd Regular Session) (September 1, 1993 through August 31, 1995); 1995 TEX. GEN.LAWS 5260-5261, Goal A.1.1 (74th Regular Session) (September 1, 1995 through August 31, 1997); 1997 TEX. GEN.LAWS 5552, Goal A.1.1 (75th Regular Session) (September 1, 1997 through August 31, 1999); 1999 TEX. GEN.LAWS 5467, Goal A.1.1 (76th Regular Session) (September 1, 1999 through August 31, 2001), 2001 TEX. GEN.LAWS 5434, Goal A.1.1 (77th Regular Session) (September 1, 2001 though August 31, 2003).

18. During every legislative session since this case began, the Texas legislature has confirmed the Attorney General's authority to settle litigation. 1993 TEX. GEN. LAWS 4564, 4572, Rider 15 (73rd Regular Session); 1995 TEX. GEN. LAWS 5260, 5268, Rider 14 (74th Regular Session); 1997 TEX. GEN. LAWS 5552, 5558, Rider 10 (75th Regular Session), 1999 TEX. GEN. LAWS 5467, 5474, Rider 10 (76th Regular Session); 2001 TEX. GEN. LAWS 5434, 5440, Rider 8 (77th Regular Session).

C. IT WOULD IMPUGN THE COURTS' INTEGRITY TO ALLOW STATE OFFICIALS TO ACTIVELY URGE A COURT TO ENTER A DECREE AND THEN ASSERT THAT THE COURT LACKS JURISDICTION TO ENFORCE THE DECREE. When State officials waive sovereign immunity by invoking federal court jurisdiction, it is important for the waiver to "stick." When State officials "'voluntarily . . . submit [. . . their] rights [concerning a decree] for judicial determination, [they] will be bound thereby and cannot escape the result[s] of [their] own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring), *quoting Gunter*, 200 U.S. at 284.

> It would seem anomalous or inconsistent for [the officials] both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.

Lapides, 535 U.S. at 619.

State officials must not be allowed to trivialize the Eleventh Amendment by using it for "'unfair tactical advantage[s]'," *Lapides*, 535 U.S. at 621, *citing Schacht*, 524 U.S. at 393-394 (Kennedy, J., concurring); *see also*, *Roell v Withrow*, 2003 U.S. Lexis 3427 at *6 (April 29, 2003) ("risk of gamesmanship"). It is not fair to allow State officials to obtain concessions during negotiations and then ignore their agreed (and ordered) obligations. *See*, *Kozlowski v Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989). It is not fair to expect plaintiffs to waive their right to trial in exchange for a consent decree that cannot be enforced.

It would impugn the federal courts' integrity to allow State officials to reassert immunity from enforcement of agreed

consent decrees. *See*, *Lapides*, 535 U.S. at 621. Courts should not be put in the awkward position of expending time and effort to decide whether to approve and enter consent decrees that they cannot enforce. To protect "judicial efficiency," parties should not have "the luxury of waiting for the outcome before denying the [federal] judge's authority" to enforce a consent decree. *Roell*, 2003 U.S. Lexis 3427 at *6.

Under the court of appeals' rule, district courts' decisions to adopt settlements as orders are meaningless, and so are the courts' decrees, because State officials are free to ignore validly adopted orders. This is not the proper rule of law; even federal injunctions that are "subject to substantial constitutional question" must be obeyed unless modified or dissolved. *Walker v City of Birmingham*, 388 U.S. 307, 317-19, 321 (1967); *Hook v State of Ariz. Dep't. of Corrections*, 972 F.2d 1012, 1016 (9th Cir. 1992) (subsequent history omitted).[19]

Finally, jurisdictional rules should "make sense." *Lapides*, 535 U.S. at 620. For example, *Lapides* prohibits a defendant from removing a case to federal court, having it dismissed because of the Eleventh Amendment, seeking removal again, requesting dismissal again, and on and on *ad infinitum*. In the context of consent decrees, it would not "make sense" to allow State officials to urge entry of a decree to avoid trial, and then force trial on the merits before the plaintiffs could get relief from a decree violation — and possibly yet another trial on the merits in the event of another decree violation. This dizzying cascade of events particularly does not "make sense" when the consent decree was entered because everyone agreed that trial on the merits was not necessary. *See*, *Rufo*, 502 U.S. at 390, *quoting Plyler v Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991) (should not need a "constitutional decision every time an effort was made . . . to enforce . . . the decree by judicial action.")

19. The *Walker* rule is fair because State officials may seek modification or dissolution of a decree as allowed by Federal Rule of Civil Procedure 60(b) and this Court's decision in *Rufo*, 502 U.S. 367; *see also*, *Miller v French*, 530 U.S. 327, 342-349 (2000).

D. Sovereign Immunity Does Not Bar The District Court's Enforcement Orders Because Those Orders Are Ancillary To The Consent Decree And The District Court Has Jurisdiction Over The Decree. "[T]he proposition that the Eleventh Amendment . . . control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, *is not open for discussion*." *Gunter*, 200 U.S. at 292 (emphasis added), *followed in Lapides*, 535 U.S. at 619. Ancillary jurisdiction allows "a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380. The doctrine permits a district court to enforce a decree that explicitly retains jurisdiction over the decree and disputes about it, as is true in this case. *Id.* at 381; L.; ¶303.

The district court had clear jurisdiction over this case and the consent decree. *Verizon.*, 535 U.S. at 647-648; *Ex parte Young*, 209 U.S. 123. "[J]urisdiction as to . . . [State officials] . . . has been acquired as a result of the voluntary action of the . . . [State officials] . . . in submitting . . . [their] . . . rights to judicial determination" in the decree. *See Gunter*, 200 U.S. at 292. As a result, the district court had ancillary jurisdiction to enter its later memorandum opinion and remedial order to require the State officials to develop remedial plans to bring them into compliance with the decree that they sought. Pet. App. 54a; 276a.

The court's ability to enforce its orders is particularly important because its interpretation of federal law "is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States." *Cooper v Aaron*, 358 U.S. 1, 18 (1958). State officials cannot "nullify a federal court order." *Id.* at 19. If they "had such power, . . . 'it is manifest that the fiat of a state . . . [official,] . . . and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal . . . [law] . . . upon the exercise of state power would be but impotent phrases. . . .'" *Id. quoting Sterling v Constantin*, 287 U.S. 378, 397-398 (1932).

II. *EX PARTE YOUNG* PERMITS ENFORCEMENT OF A CONSENT DECREE THAT IS BASED ON FEDERAL LAW AGAINST STATE OFFICIALS, EVEN IF DECREE VIOLATIONS ARE NOT ALSO VIOLATIONS OF FEDERAL RIGHTS.

The court of appeals incorrectly held that "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. 27a-28a. The consequences will be severe if the Fifth Circuit's approach is correct. If the court of appeals is affirmed, plaintiffs will not enter into consent decrees with State official-defendants because plaintiffs will have to prove their case on the merits — that their rights have been violated — to prove that an agreed decree has been violated. Plaintiffs will not waste time and energy to negotiate decrees that cannot be enforced without a full trial. The remedial option of consent decrees will not be available to plaintiffs or State official-defendants in cases concerning ongoing violations of federal law. This does not make sense, because the consent decree option allows State officials to incorporate their judgment and discretion into agreed orders, which federal courts are supposed to encourage.

After describing the errors in the court of appeals' analysis, the children urge a better rule. If a consent decree is properly entered, it can also properly be enforced against State officials. *Firefighters v City of Cleveland*, 478 U.S. 501, 523-524 (1986) (decree entry).

A. In *Ex parte Young* Cases, Sovereign Immunity Does Not Bar Forward-Looking Enforcement Of A Consent Decree That Provides Prospective Relief. This is a classic *Ex parte Young* case because the children's "'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 535 U.S. at 645, *quoting Idaho v Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring). The children allege ongoing violations of the federal Medicaid Act. 42 U.S.C. §§ 1396a(a)(43), 1396d(r). Further, the children seek only injunctive and declaratory relief, which are both prospective in nature.

"*Ex parte Young* is one of the three most important decisions the Supreme Court of the United States has ever handed down." 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4231 at 559 (2d ed. 1988). *Ex parte Young* is necessary to our nation's constitutional design because "prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68. In accord with our constitutional design, *Ex parte Young* vests in the federal courts not only the authority but also "the *constitutional duty* to vindicate 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 109 n.17, *quoting Ex parte Young* (emphasis added).

The court of appeals' analysis erroneously relies on the Eleventh Amendment because "*Young* and its progeny render the Amendment *wholly inapplicable* to a certain class of suits." *Puerto Rico*, 506 U.S. at 146 (emphasis added). A consent decree enjoining State officials' violation of the Medicaid Act does "not engage the Eleventh Amendment." *Wisconsin Hosp. Ass'n. v Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (per J. Posner).[20]

Sovereign immunity should not bar enforcement of exactly the type of prospective relief that is necessary to properly balance the important constitutional principles of the supremacy of federal law and sovereign immunity. *Alden*, 527 U.S. at 747-748. The consent decree in this case only provides the type of prospective relief that *Ex Parte Young* envisions.

Further, the subsequent remedial order is also forward-looking. It only requires Respondents to develop "proposed

20. In keeping with *Ex parte Young*, the officials did not argue in their motions to dismiss that the Eleventh Amendment prohibited suit as to them..

corrective action plans to remedy each violation of the decree" found in the memorandum opinion. Pet. App. 277a (remedial order), Pet. App. 54a *et seq* (memorandum opinion).

B. The Eleventh Amendment Does Not Require A Federal Court To Find A Violation Of A Federal Right Before Enforcing A Consent Decree. The court of appeals held that the Eleventh Amendment means that "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. 27a-28a. The court of appeals relied on its controversial decision in *Lelsz I*,[21] which holds that the Eleventh Amendment bars enforcement of a consent decree based on state law. 807 F.2d at 1247, *citing Pennhurst*, 465 U.S. 89.

The court of appeals' conclusion is wrong because the Eleventh Amendment does not inquire into whether rights have been violated in *Ex Parte Young* cases. For example, in *Verizon*, a local exchange carrier claimed that State officials' orders violated the Telecommunications Act of 1996's provisions concerning reciprocal compensation for local exchange networks. 535 U.S. at 635. Verizon sought prospective relief from State Commissioners, in their officials capacities, as well as other defendants.

Verizon does not ask whether the Telecommunications Act had in fact been violated to determine whether sovereign immunity barred suit. *Id.* at 646. "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. . . . 'An *allegation* of an ongoing violation of federal law . . . is ordinarily sufficient.'" *Id.* at 646, *quoting Coeur d'Alene*, 521 U.S. at 281 (emphasis added in

21. *Lelsz*' distinction between jurisdiction to enter a decree and jurisdiction to enforce it is "untenable." *Kozlowski*, 871 F.2d at 244. Other courts of appeals agree with the Second Circuit. *Komyatti v Bayh*, 96 F.3d 955 (7th Cir. 1996); *Duran v Carruthers*, 885 F.2d 1485 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

Verizon original); *see also*, *Suter*, 503 U.S. at 354 n.6 (approving a consent decree entered into by State officials and based on Social Security Act provisions that did not create rights. *Id.* at 364.)

The very nature of the case before this Court demonstrates the point. There is no final judgment; the State officials' appeals to the lower court are interlocutory. Interlocutory appeal from a denial of sovereign immunity is proper precisely because the denial presents "'an important issue *completely separate from the merits of the action*'." *Puerto Rico*, 506 U.S. at 144, *quoting Coopers & Lybrand v Livesay*, 437 U.S. 463, 468 (1978) (emphasis added).

C. The Eleventh Amendment Should Not Require A "Public Mea Culpa" Or Finding That State Officials Violate Federal Law Before A Consent Decree Can Be Enforced. It should not be necessary for a district court to find a violation of rights to enforce a consent decree that State officials earlier asked the court to enter. "[A] State should not be deprived of the opportunity to avoid 'an expensive and protracted contest and the possibility of an adverse and disruptive adjudication' by a rule insisting on a 'public *mea culpa*.'" *Lawyer*, 521 U.S. at 574, *quoting Scott v United States Dep't. Of Justice*, 920 F. Supp. 1248, 1252 and n.2 (M.D. Fla. 1996) (lower court's entry of agreed redistricting plan).

As in *Lawyer*, in this case the district court assured itself that there was a sufficient basis to approve the proposed decree. The district court properly balanced the competing interests of guarding against "'disingenuous adventures' by litigants" and the advantages of an agreed settlement. 521 U.S. at 575, *quoting Scott*, 920 F. Supp. at 1252 n.2. The lower court found "a substantial 'evidentiary and legal' basis for the plaintiffs' claim[s]" before approving the consent decree. 521 U.S. 574, *quoting Scott*, 920 F. Supp. at 1252.

After a day long hearing, the district court adopted the proposed decree because it "is fair, reasonable and adequate."

Fairness Order at 1. After reviewing considerable evidence and legal arguments, the district court concluded that it was likely that the "Plaintiffs could have succeeded at trial." *Id.* at 25. *See also*, Order (filed August 10, 1994) (denying motion to dismiss).

D. The Lower Court's Rule Unduly Restricts Federal Courts' Equitable Powers. The Fifth Circuit's ruling unduly restricts the remedies that should be available — and enforceable — when State officials agree to them.[22] Consent decrees may do more than just order State officials to obey the law. For example, in *Rufo*, 502 U.S. 367, inmate-plaintiffs and jail official-defendants agreed to a consent decree to resolve the inmates' claims that jail conditions violated the Constitution. "[T]o 'save themselves the time, expense and inevitable risk of litigation, . . . [defendants] could settle the dispute . . . by undertaking to do more than [federal law] itself requires.'" *Id.* at 389, *quoting Armour*, 402 U.S. 681. Even after a properly requested modification, a consent decree in institutional reform litigation need not "conform[. . .] to the constitutional floor." *Rufo*, 502 U.S. at 391. For example, *Rufo* addressed a motion to modify a consent decree that required single bunking in a county jail. By the time of *Rufo*, it was clear that double bunking did not necessarily violate federal law. *Bell v Wolfish*, 441 U.S. 520, 542-543 (1979).

Although *Rufo* addresses claims of Constitutional violations, *Rufo*'s approach also applies to consent decrees that address violations of the Social Security Act, such as the Medicaid Act. "[P]arties may agree to provisions in a consent decree which *exceed the requirements of federal law*." *Suter*, 503 U.S. at 354 n.6 (dicta) (entry of decree concerning Adoption Assistance and Child Welfare Act) (emphasis added).

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22. Congress' "clearest command" is required to "displace courts' traditional equitable authority." *Miller*, 530 U.S. at 340. Congress has not limited federal courts' equitable powers in the context of lawsuits like this one.

In contrast, the court of appeals erred by severely restricting the relief that consent decrees may provide. Under the lower court's rule, enforceable consent decrees can only provide relief that equals "rights" granted by federal law. To show a decree violation sufficient to justify enforcement by the court, plaintiffs would have to show that a decree violation "is also a violation of a federal right." Pet. App. 27a-28a.[23]

The lower court's limitation also runs contrary to federal courts' longstanding equitable powers. Federal courts do — and should — have plenary power to enter and enforce injunctions. *See, Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971); *Milliken*, 433 U.S. at 281-283.[24] Indeed, a federal court has the continuing obligation and discretion to interpret its decree and to determine if other orders are necessary from time to time to effectuate its purposes. *Swann*, 402 U.S. at 15-16. After proper notice and opportunity for both sides to be heard, federal courts may issue further orders to accomplish the

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23. The *Lelsz II* dissent explained the error in the Fifth Circuit's analysis:

> There can be no doubt that a federal court, to remedy federal violations, may require state officers to adopt programs that, absent the federal violations, were not guaranteed to the plaintiffs by the Constitution or federal statute. The remedial program need only be tailored to cure the condition that offends federal law. *Milliken v Bradley*, 433 U.S. 267, . . . (1977); *Gates v Collier*, 501 F.2d 1291 (5th Cir. 1974). If the parties do not choose to proceed to trial, the court may, with their agreement, enter a consent decree that provides relief greater than the court might have awarded after trial. *Local 93 v City of Cleveland*, 478 U.S. 501 . . . (1986). The panel opinion is inconsistent with that clearly established law.

815 F.2d at 1036-1037 (dissent from denial of rehearing en banc by Reavley, J., with whom Clark, Chief Judge, Rubin, Politz, Randall, Johnson and Williams joined) (parallel citations omitted).

24. The *Milliken* defendants included State officials. Defendant Milliken himself was the governor of Michigan. 433 U.S. at 267-269.

aims of an earlier consent decree. *United States v United Shoe Machinery Corp.*, 391 U.S. 244, 248-251 (1968).

Although subject to review for abuse of discretion, federal courts have broad and flexible power to issue injunctions with sufficient specificity to resolve disputes. *Spallone v United States*, 493 U.S. 265, 273-276 (1990); *see also Milliken*, 433 U.S. at 281-282. For example, in disputes about segregated schools, federal courts may order remedial education programs, special in-service teacher training, changes in student testing programs or even suspension of testing, *Id.* at 282-288. These remedies are proper even though their absence does not violate equal protection requirements, because they remedy the consequences of unlawful actions. *Id.* at 288.

When using their power to fashion injunctive relief by court order (instead of by agreement), federal courts must respect State officials' exercise of their discretion to the extent possible. *Milliken*, 433 U.S. at 280-281. It would not make sense for federal courts to lack jurisdiction to enforce consent decrees, which already represent and incorporate the officials' discretion.

In this case, the district court's remedial order takes special care to respect the officials' judgment about how to come into compliance with the violated decree provisions, as *Milliken* envisions. Instead of independently imposing its own remedial requirements, the district court merely ordered the officials to propose "corrective action plans to remedy each violation of the decree." Pet. App. 276a-277a.

E. Contrary To Principles Of Basic Fairness, Under The Court Of Appeals' Rule It Would Be Impossible For Consent Decrees To Be "Specific In Terms" And "Describe In Reasonable Detail . . . The Act Or Acts Sought To Be Restrained" When State Officials Are Defendants. Fed. R. Civ. P. 65(d). "[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v Lessard*, 414 U.S. 473, 476 (1974) (per curiam). To "prevent uncertainty and confusion on the part of

those faced with injunctive orders," *id.*, prospective relief "shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained." Fed. R. Civ. P. 65(d).

To protect the supremacy of federal law, federal courts must be able to provide prospective relief from State officials' violation of law. *Green*, 474 U.S. at 68. But, the court of appeals' rule makes it impossible to agree to enforceable consent decrees in cases involving State official-defendants. Consent decrees cannot meet the standards of both the Fifth Circuit and the Federal Rules of Civil Procedure. If a consent decree cannot be enforced unless "any such consent decree violation is also a violation of a federal right," Pet. App. 27a-28a, it is impossible for consent decrees to be drafted with sufficient specificity and detail to meet Fed. R. Civ. P. 65(d)'s requirements. For example, a consent decree that simply required State officials to "comply with federal EPSDT law," or "protect the children's EPSDT rights" would not adequately inform the officials of what conduct is required.

F. Contrary To Important Principles Of Judicial Administration, The Court Of Appeals' Rule Would Make Consent Decrees Useless In Cases Against State Officials. If a decree's remedies cannot be enforced unless violation of the decree also violates federal rights, then the parties can gain nothing by entering into a consent decree. To enforce the decree, the plaintiffs would have to start at square one, as if they were proceeding to trial to prove that their rights had been violated — not simply that the decree had been violated. There would be a "disincentive to negotiation of settlements in institutional reform litigation" because trial on the merits would still be required if plaintiffs ever sought a judicial order of enforcement. *See, Rufo*, 502 U.S. at 389.

Prohibiting enforcement of a consent decree unless a decree violation is also a violation of rights would mean that "'the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving

minimal [lawful] standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal [legal] requirements.'" *Id.* at 390, *quoting Plyler*, 924 F.2d at 1327 (emphasis in *Plyler* original).

It is in the public interest, the judiciary's interest and even State officials' interest for State officials to be able to enter into consent decrees that can be enforced without a return to what is in essence a trial on the merits. Federal court proceedings will be longer and more complex if consent decrees are not a practical and useful way to resolve disputes against State officials. Federal courts will be forced to intrude into State officials' affairs more than they do when they enter and enforce decrees — which represent the officials' discretion about resolving disputes. The public interest is not well served by the increased cost and delay that will result if State officials cannot amicably resolve litigation about important issues via settlement.

Finally, if the Fifth Circuit's rule becomes the law of the nation, plaintiffs and State officials will lose an important remedial option because it will not be worth it for plaintiffs to enter into consent decrees with the officials. Neither plaintiffs nor State officials will have a viable option to settle cases, because plaintiffs will not agree. This result would not make sense, particularly in *Ex Parte Young* cases, which often involve complex disputes that are best resolved by decrees that incorporate State officials' judgment.

G. When A Federal Court Properly Enters A Consent Decree In A Case Based On Federal Law, Sovereign Immunity Does Not Bar Enforcement Of The Decree Against State Officials. The correct approach to determining if a federal court can enforce a consent decree is simple: "If a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski*, 871 F.2d at 244. Otherwise, consent decrees would be meaningless because it would be solely up to State officials whether or not to comply. Federal courts

and their orders should not be so demeaned. Further, courts should not have to make difficult jurisdictional decisions "'every time an effort [is] made to enforce or modify the decree by judicial action.'" *Rufo*, 502 U.S. at 390, *quoting Plyler*, 924 F.2d at 1327.

To be properly entered, a consent decree "must (1) 'spring from and serve to resolve a dispute within the court's subject-matter jurisdiction'; (2) 'come within the general scope of the case made by the pleadings'; and (3) 'further the objectives of the law upon which the complaint was based.'" *Firefighters*, 478 U.S. at 525. When these three elements are established, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Id.* at 525.

Firefighters should also determine if a district court can enforce its decree. *Firefighters'* first factor assures that district courts only enter decrees if the courts have jurisdiction over the dispute. As a consequence, the courts will only enforce consent decrees in cases where they already have jurisdiction.

This case meets the *Firefighters* test. The court has jurisdiction because this case presents a dispute about a federal question — compliance with the federal Medicaid Act. 28 U.S.C. § 1331; 42 U.S.C. § 1396 *et seq*.

Further, the consent decree comes within the general scope of the pleadings. The complaint raises, and the consent decree resolves, disputes about the officials' failure to comply with the Medicaid Act's EPSDT requirements. 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

1. Congress' Purposes In Medicaid And EPSDT. The consent decree (and the sections of the decree raised in the children's motion to enforce it) furthers the objectives of the federal Medicaid statute and its EPSDT provisions. Medicaid's purpose is to 1) assist those "whose income and resources are insufficient to meet the costs of necessary medical services"

and 2) assist "families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396.

Consistent with these important goals, EPSDT establishes a common-sense health care program for indigent children. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). EPSDT provides for a comprehensive range of health care services. The "foundation" is preventive screens ("check ups"). Fairness Order at 6. Congress clearly "desire[s] to require participating states to provide eligible children with a comprehensive *preventive* . . . program." *Mitchell v Johnston*, 701 F.2d 337, 348 (5th Cir. 1983) (emphasis in original).

In addition to preventive care, EPSDT requires the officials to provide the children with all necessary health care services that the Medicaid Act authorizes, even if those services are optional for adults. 42 U.S.C. §§ 1396a(a)(43)(C); 1396d(r)(5); The officials have an "obligation to provide to children under the age of twenty-one *all necessary services*." *Pereira v Kozlowski*, 996 F.2d 723, 726 (4th Cir. 1993) (emphasis added). *See, also, Pittman v Secretary, Florida Dep't of Health and Rehabilitative Services*, 998 F.2d 887, 889, 891-892 (11th Cir. 1993); *Miller v Whitburn*, 10 F.3d 1315 (7th Cir. 1993).

Finally, State officials must inform the children about the services that are available to assist the children to actually obtain services. 42 U.S.C. §§ 1396a(a)(43)(A) (informing). The officials must either provide or arrange for health care services that children need, including screens. 42 U.S.C. §§ 1396a(a)(43); (B); (C) (provide or arrange screens and other services).

The entire package of EPSDT services furthers the Medicaid Act's important goals of providing indigent children with health care to allow them to attain or retain independence. 42 U.S.C. § 1396. "EPSDT "is important for children. . . . [I]t's a way to get them into a system of care so that hopefully they break the cycle of poverty life by not having to miss school. . . ." Testimony of Dr. Lopez, the officials' former Dental Director, *quoted in* Fairness Order at 8; *see, also, Id.* at 10-12.

2. The Consent Decree Furthers Congress' Purposes In Medicaid And EPSDT. The decree itself indicates that the order was negotiated with federal EPSDT and Medicaid law and purposes in mind. "[T]he agreements negotiated by the parties which led to this Order were reached *within the framework of federal law related to the EPSDT and Medicaid programs* as it existed prior to the execution of the Court's Order." L; ¶308 (emphasis added). As the decree notes, and as the State officials agreed, Texas' "EPSDT program can be improved." L.; ¶5.

Each consent decree provision raised in the children's motion to enforce the decree furthers Congress' stated purpose in enacting Medicaid and EPSDT, as follows:

The decree requires the officials to assure that all children, including at risk subgroups, receive medical and dental screens. L.; ¶¶2, 3, 143, 192, 212. Medical and dental screens are an essential aspect of EPSDT. 42 U.S.C. § 1396a(a)(43)(B). As the State official's EPSDT Director agreed, it is "certainly" important — as well as required by federal law — for all children to get complete check ups. Enforcement TR V-928;12-16 (Mr. Millwee, the officials' EPSDT Director).[25]

Further, the decree requires the officials to properly implement outreach and reports about it. L.; ¶¶32, 52. Congress did not write a "dead letter" when it wrote the Medicaid Act. *Wilder*, 496 U.S. at 514, *cited with approval in Gonzaga*, 536 U.S. at 280, 289 n.6. *Effective* outreach is an important aspect of the State officials' efforts to inform all of the children about EPSDT. 42 U.S.C. § 1396a(a)(43)(A). Outreach is intended to

25. The officials must develop and implement plans so that children in all areas of the State get medical screens and dental check ups, to increase the use of check ups in counties where few children get them. L.; ¶¶273-281. The corrective action plan provision protects the officials' discretion. They may use various appropriate means to address the different problems in each county, such as increasing or improving outreach, transportation, or the supply of health care providers to assist children. L.; ¶281.

increase the children's use of EPSDT services, including screens, by educating them about available services. Fairness Order at 27-28; 42 U.S.C. §§ 1396a (a)(43)(B) & (C).[26]

The officials must properly implement managed care so that children receive the full range of EPSDT services, including medical and dental screens: L.; ¶¶190, 192. Congress enacted EPSDT to provide indigent children with screens and follow up health care. 42 U.S.C. §§ 1396a(a)(43)(B) & (C). This purpose is furthered when all children receive services, regardless of the health care delivery system that the officials choose for them.

The decree requires the officials to promptly answer all toll-free number calls to assist the children to schedule appointments and obtain transportation. L.; ¶247. The officials' toll-free numbers implement the informing, screening and services aspects of the officials' EPSDT obligations. They are one way that the State officials 1) provide information about EPSDT and Medicaid to the children; Enforcement TR V-958;7-10 (Mr. Millwee); 42 U.S.C. § 1396a(a)(43)(A); 2) accept "requests" for screens. Pet. App. 274a-275a; 42 U.S.C. § 1396a(a)(43)(B); and 3) "arrange" screens and other health care services that the children need. Enforcement TR V-959;5-12 (Mr. Millwee); 42 U.S.C. §§ 1396a(a)(43)(B) (screens); (C) (other necessary health care). For example, toll-free number staff may arrange services for the children by scheduling appointments for health care or scheduling transportation to enable the children to get to and from their appointments. L.; ¶¶239-240; 243-245.

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26. The district court also has authority to order State officials to file reports to assist the court to determine if the officials are complying with the court's orders. *See*, *Hutto v Finney*, 437 U.S. 678, 683 (1978) (reports on State officials' progress) (dicta); *Dunn v New York State Dep't of Labor*, 47 F.3d 485, 488-489 (2d Cir. 1995).

The officials also must provide case management to all children who need it. L.; ¶¶248, 264. The Medicaid Act authorizes the case management service. 42 U.S.C. §§ 1396d(a)(19); 1396n(g). As a result, the officials must provide it to children who need it. 42 U.S.C. §§ 1396a(a)(43)(C); 1396d(r)(5). Congress' purpose is furthered by requiring the officials to provide case management to all children who need it, and not just to the spotty groups of children who could get case management before the decree was entered. L; ¶248; Fairness Order at 33.

"To adequately serve [the children], providers must understand how EPSDT works. They must also understand EPSDT recipients' needs." L.; ¶104; *see also*, ¶¶ 107-108, 112-114, 117-120, 124-130; 194. As part of prospective relief, federal courts may require State officials to participate in training professionals to assist children. *Milliken*, 433 U.S. at 286-287. Further, training for health care professionals is proper in this case. Normally, the State officials "arrange" screens and other services by referring the children to health care providers and managed care organizations instead of providing services themselves. *See*, 42 U.S.C. §§ 1396a(a)(43)(B) & (C) ("arrange" screens and other services). Having chosen this approach, the officials must ensure that their contracted health care providers can properly assist the children to obtain all services that they need.

The decree also requires the officials to assess and improve the transportation program annually. L.; ¶¶223-229. The transportation program assists families to "arrange" health care for the children. 42 U.S.C. § 1396a(a)(43)(B) (screens); (C) (other health services); Enforcement TR V-959;5-12 (Mr. Millwee).

Finally, the decree requires the officials to report properly on agreed health outcomes measures. L.; ¶¶295, 296. Outcomes reports "measure important aspects of the [children's] health . . . [and] . . . gauge the health of the entire EPSDT population,

not merely factions of the population." L.; ¶289. The reports assist both the State officials and the district court to determine whether the children actually receive the full range of health care that Congress envisioned for them. 42 U.S.C. §§ 1396a(a)(43)(B) (screens); (C) (treatment); 1396d(r). As the State officials agree, "it is very important to have some measures of how we are doing . . . , so we would know . . . that our program was working so we would get measures that would say, yes, children really are getting better. . . ." Fairness TR 116;23-24; *Id.* 119;24 to 120;2. (Dr. Koops); *see also* Enforcement TR III-513; 4-24 (Mr. Blanton, MPH, Texas Department of Health, Epidemiologist).

To ensure the supremacy of federal law, district courts must be able to enforce forward-looking consent decrees. In this case, the district court properly enforced decree requirements, which meet the *Firefighters* test.

The court of appeals improperly rejected this Court's *Firefighters* standard and ignored *Rufo*'s recognition that consent decrees are not bound by the minimum requirements of federal law. Instead, the Fifth Circuit incorrectly extended its controversial *Lelsz* decision to prohibit enforcement of a consent decree that prospectively enforces federal Medicaid law. This was wrong. The court of appeals' decision should be reversed and vacated because it misapplied the Eleventh Amendment and ventured into an irrelevant discussion of "rights."

CONCLUSION

The children respectfully ask this Court to 1) hold that sovereign immunity does not bar the district court from enforcing the consent decree in this case, 2) reverse the decision of the court of appeals concerning sovereign immunity 3) vacate the remainder of the court of appeals' decision because it is not necessary to resolve the questions presented and 4) remand for further proceedings.

Respectfully submitted,

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In the Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, *ET AL.*,

Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Does the *Ex parte Young* exception to the Eleventh Amendment's restrictions on federal judicial power permit a federal court to enforce a consent decree by ordering remedies that substantially exceed the requirements of federal law?

2. Do state officials who lack authority under state law to waive the State's Eleventh Amendment immunity clearly and voluntarily invoke the jurisdiction of the federal courts by deciding to settle an *Ex parte Young* lawsuit with a consent decree that lacks any explicit waiver statement?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	vi
Respondents' Brief	1
Statement of the Case	1
Summary of the Argument	6
Argument	9
I. The *Ex parte Young* Exception to the Eleventh Amendment Does Not Permit Enforcement of Consent-Decree Provisions That Exceed the Requirements of Federal Law	9
A. The *Ex parte Young* Doctrine Is a Limited Exception to the Sovereign States' Eleventh Amendment Immunity from Suit	10
B. The Material Jurisdictional Inquiry for Enforcement of a Consent Decree Is Whether the Motion to Enforce—Not the Underlying Complaint—Identifies an Ongoing Violation of Federal Law	12
C. A Consent Decree Does Not Expand the *Young* Exception to Eleventh Amendment Immunity	16
D. Eroding the Federal-Law Basis for *Young* Would Raise Serious Federalism and Separation-of-Powers Concerns	22

TABLE OF CONTENTS—Continued

	Page
1. The exercise of the federal judicial power under *Young* should respect the separation of powers of state governments	23
2. Maintaining *Young*'s constraints ensures that federal courts operate within the bounds of federalism and separation of powers	27
E. Consent Decrees Will Not Lose Their Utility in the Absence of the Enforcement Power Advocated by Frew	30
II. The State Does Not Consent to Suit in Federal Court When State Officers Agree to Settle an *Ex parte Young* Case Through a Consent Decree	32
A. Frew Defaulted the Argument That the State of Texas Consented to Suit in Federal Court	33
B. Negotiating and Proposing the Consent Decree Was Not a Clear Waiver by the State of Texas of Its Eleventh Amendment Immunity	35
1. A State's Eleventh Amendment immunity from suit is not relinquished except when done so expressly and unequivocally	35
2. A State does not voluntarily invoke the jurisdiction of a federal court when state officials settle an *Ex parte Young* suit in federal court	36

TABLE OF CONTENTS—Continued

Page

a. Entry into a consent decree is not a voluntary invocation of federal court jurisdiction 36

b. Voluntary consent cannot be given in an *Ex parte Young* case because the State is not a party 37

c. The language of the decree does not reveal a waiver 39

3. *Lapides* did not alter the requirements for a State's consent to suit in federal court for federal-law claims 40

C. An Assistant Attorney General's Representation of State Officials in Negotiations and Proposal of a Consent Decree Cannot Be Regarded as the Consent of the Sovereign 43

1. The Attorney General for the State of Texas is not authorized to waive the State's immunity from suit in federal court 43

2. The States' legislatures—not executive or administrative officials—are uniquely equipped to decide whether and where to consent to suit 46

D. Limiting a Federal Court's Enforcement Authority to Violations of Federal Law Effectuates the Eleventh Amendment's Jurisdictional Constraints on Federal Power and Does Not Promote Gamesmanship or Impugn the Integrity of Federal Courts 48

TABLE OF CONTENTS—Continued

Page

III. Even If the Court Decides That the State Relinquished Its Eleventh Amendment Immunity, the State Retained Other Inviolable Attributes of Sovereignty That Restrict the District Court's Enforcement Power 49

Conclusion 50

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*

Alexander v. Choate, 469 U.S. 287 (1985) 15

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 14

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 35

Baker v. Ives, 294 A.2d 290 (Conn. 1972) 46

Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991) 19

Bell v. Wolfish, 441 U.S. 520 (1979) ..... 2[illegible]

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City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970) 19

City of San Angelo v. Deutsch, 91 S.W.2d 308 (Tex. 1936) 18

Clark v. Barnard, 108 U.S. 436 (1883) 37, 38, 48

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) ..... *passim*

Demarest v. Manspeaker, 498 U.S. 184 (1991) 34

Edelman v. Jordan, 415 U.S. 651 (1974) 35, 37

Evans v. City of Chicago, 10 F.3d 474 (CA7 1993) (en banc) 24, 26, 30, 32

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TABLE OF AUTHORITIES—Continued

Page

Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n, 450 U.S. 147 (1981) 41

Ford Motor Co. v. Dep't of Treas., 323 U.S. 459 (1945) 43, 44, 45

Gardner v. New Jersey, 329 U.S. 565 (1947) 37, 38, 48

Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 16

Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001) 44

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 14, 15

Green v. Mansour, 474 U.S. 64 (1985) 11, 15, 31

Gunter v. Atl. Coast Line R.R., 200 U.S. 273 (1906) ... 13, 38

Hans v. Louisiana, 134 U.S. 1 (1890) 10, 27, 47

Heckler v. Cmty. Health Servs. of Crawford County, 467 U.S. 51 (1984) 18

In re Hood, 319 F.3d 755 (CA6 2003), *pet. for cert. filed*, 71 U.S.L.W. 3724 (U.S. May 2, 2003) (No. 02-1606) 34

Kentucky v. Graham, 473 U.S. 159 (1985) 11, 12

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994) 12, 16

Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002) ..... *passim*

League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (CA5 1993) 45

Lelsz v. Kavanagh, 807 F.2d 1243 (CA5 1987) 15

TABLE OF AUTHORITIES—Continued

Page

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 15, 17, 20, 21

Meyer v. Holley, 123 S.Ct. 824 (2003) 34

Milliken v. Bradley, 433 U.S. 267 (1977) 21, 22

Missouri v. Jenkins, 515 U.S. 70 (1995) ..... *passim*

Office of Pers. Mgmt. v. Richmond, 496 U.S. 414 (1990) 18

Overton v. City of Austin, 748 F.2d 941 (CA5 1984) 26

Pennhurst State Hosp. v. Halderman, 465 U.S. 89 (1984) ..... *passim*

Perry v. Del Rio, 67 S.W.3d 85 (Tex. 2001) 46

Pope v. United States, 323 U.S. 1 (1944) 17

Power v. Summers, 226 F.3d 815 (CA7 2000) 34

R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (CA1 2002) 34

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002) 37

Regents of Univ. of Cal. v. Doe, 519 U.S. 425 (1997) 44

Rizzo v. Goode, 423 U.S. 362 (1976) 19

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 21, 30

Ry. Employees v. Wright, 364 U.S. 642 (1961) 18

Saahir v. Estelle, 47 F.3d 758 (CA5 1995) 15

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 10

Suter v. Artist M., 503 U.S. 347 (1992) 13

TABLE OF AUTHORITIES—Continued

Page

Taylor v. Freeman, 34 F.3d 266 (CA4 1994) 22

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Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849 (Tex. 2002) 44

United States v. Armour & Co., 402 U.S. 673 (1971) 36

United States v. ITT Cont'l Baking Co., 420 U.S. 223 (1975) 17

United States v. Mississippi, 380 U.S. 128 (1965) 32

United States v. Swift & Co., 286 U.S. 106 (1932) 17

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 14

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) 12, 13, 22

Washington v. Penwell, 700 F.2d 570 (CA9 1993) 26

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) 14

Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) 11

Wis. Dep't of Corr. v. Schacht, 524 U.S. 381 (1998) 37, 38

Statutes, Rules, and Constitutional Provisions

1 TEX. ADMIN. CODE §357.1-.29 ..... 28, 32

42 C.F.R. §431.200 *et seq.* 28, 32

42 U.S.C. §1396a(a) 15

42 U.S.C. §1396a(a)(3) 28, 32

42 U.S.C. §1396a(a)(43) 2

42 U.S.C. §1396a(b) 2, 15, 28

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. §1396a(r) 2
42 U.S.C. §1396c 28, 32
42 U.S.C. §1983 ..... 1, 3, 14, 15
FED. R. CIV. P. 23(e) 3
FED. R. CIV. P. 41(a)(1) 31
TENN. CONST. art. I, §17 46
TEX. CONST. art. II, §1 25
TEX. GOV'T CODE §402.004 45
TEX. GOV'T CODE §531.002 44
TEX. HEALTH & SAFETY CODE §12.021 44
U.S. CONST. amend. XI ..... *passim*

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TABLE OF AUTHORITIES—Continued

Page

Robert Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) 27

THE FEDERALIST, No. 47 (Benjamin F. Wright ed., 1961) 9

Special Joint Meeting of the Texas House of Representatives Committee on Public Health and Appropriations Health and Human Services Subcommittee (audiotape on file with Texas House of Representatives Media Office) (Sept. 21, 2000) 25

RESPONDENTS' BRIEF

In *Ex parte Young*, the Court crafted a narrow exception to the States' Eleventh Amendment immunity that allows prospective injunctive suits against state officers to remedy ongoing violations of federal law. This case requires the Court to decide whether the limitations of *Ex parte Young* apply when a court is enforcing a consent decree, or whether a federal court in equity may order relief against States that exceeds any requirement of federal law.

Additionally, in the eleventh hour, Petitioner Frew has added a new allegation that the state officials' decision to settle the case by consent decree waived the protections of the Eleventh Amendment. Therefore, the Court may also choose to decide whether settling an *Ex parte Young* suit through a consent decree—after the State has been dismissed on Eleventh Amendment grounds—constitutes a clear and unequivocal waiver of Eleventh Amendment immunity.

STATEMENT OF THE CASE

This case involves a district court's long endeavor to oversee Texas state officials' administration of a cooperative federal-state Medicaid program aimed at the health care of indigent youth. In 1993, Petitioners[1] filed this class-action lawsuit seeking prospective relief under 42 U.S.C. §1983 against two state agencies—the Texas Health and Human Services Commission and the Texas Department of Health

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1. Petitioners are the named plaintiffs. Pet'r Br. ii. Because Linda Frew is the lead Petitioner, Respondents reference Petitioners collectively as "Frew." *See* 2.R.652.

—and officials of those agencies. 1.R.1.[2] The suit was filed in the Eastern District of Texas, before Judge William Wayne Justice. Frew claimed that Texas's "early and periodic screening, diagnostic, and treatment services" (EPSDT) program did not "assure" that class members received screening services—nor treatment services for problems discovered through screening—and that it did not "effectively inform" class members about the availability of program services. Pet. App. 6a-7a; 1.R.1; 3.R.821-22; 1.R.16-17.

The federal requirements for the States' EPSDT programs are limited to three categories of services: (1) informing eligible recipients of the services available; (2) providing screening services when they are requested; and (3) arranging for corrective treatment of needs disclosed through screening services. *See* 42 U.S.C. §§1396a(a)(43), 1396a(r). Participating States are required to develop a plan for administering an EPSDT program and to submit it to the Secretary of Health and Human Services, who must approve it if it satisfies the statutory conditions. *See id.* §1396a(b).

In November 1993, the state agency defendants moved to dismiss on Eleventh Amendment grounds. 1.R.42. Frew's response acknowledged the State's refusal to waive immunity: "Defendants object to suit against them in federal court and assert the protection from federal litigation that the eleventh amendment provides to them. Given Defendants' refusal to consent, Plaintiffs do not object to the dismissal of the two state agencies from this case." 1.R.215.

2. References to the court of appeals's record are cited as "__.R.__," with the first numeral representing the volume of the record and the second numeral indicating the page. "___.SR.___" references are to the supplemental record.

In June 1994, before ruling on the state agencies' motion to dismiss, the district court certified a class of Texas Medicaid recipients under the age of twenty-one, estimating that the class included over 1.5 million Texas youth. Pet. App. 7a & n.6, 54a; 2.R.668. Two months later, the district court granted the state agencies' motion and dismissed them from the lawsuit based on the State's Eleventh Amendment immunity. 3.R.818-20.

The district court refused, however, to dismiss Frew's claims against the state officials and denied their motion to dismiss, in which they had argued that class members lacked the necessary federal rights to make their claims actionable under 42 U.S.C. §1983. 3.R.807; 1.R.42; 2.R.446.

Soon thereafter, the parties began settlement negotiations and developed a consent-decree proposal. Pet. App. 7a & n.7; 3.R.875, 1013; 4.R.1028. The proposed decree was filed with the district court in July 1995. 4.R.1028. The decree describes itself as an "attempt by the parties to resolve many of the issues in this litigation amicably, in the best interests of the class and without the need for the Court's intervention." Lodging ¶301.[3] After a fairness hearing in December 1995, the district court entered the consent decree. 3.R.993; Pet. App. 7a; 4.R.1028; *see also* FED. R. CIV. P. 23(e). The decree is a lengthy document, entailing 308 paragraphs of detailed and specific procedures for Texas's EPSDT program. Pet. App. 7a-8a & n.9. Almost one half of the document is devoted to the program's outreach and informing efforts. *See id.*, at ¶¶10-142. The decree's requirements range from "effectively inform[ing]" recipients about the program, *id.*,

3. Frew has lodged the consent decree with the Court. *See* Pet. 1. References to the consent decree are cited as "Lodging ¶___," with the numeral indicating the relevant paragraph number of the consent decree.

at ¶¶11, 52, to providing regular data reports to Frew, *id.*, at ¶286, to offering toll-free telephone assistance that will be answered "promptly" by "knowledgeable, helpful, and polite" individuals, *id.*, at ¶247.

Texas made dramatic improvements in its program. For instance, the number of workers assigned to the program increased from about ten in 1993 to almost 500 in 2000. Pet. App. 3a. The program also made particular progress in the area of outreach. *See* Pet. App. 3a; *see also* Pet. App. 69a n.17. The number of outreach contacts increased from two million in 1995 to 4.8 million in 1999. 5.SR.880. And the state officials entered into a $7.6 million contract for an outside group to provide outreach services—the largest EPSDT contract for outreach services in the United States. *See* Pet. App. 70a-71a n.19.

In addition to the substantial improvements in outreach efforts, there were significant improvements in the two required "participation ratios," federal-government measures of the percentage of eligible recipients who have at least one annual screening visit. Pet. App. 3a (explaining that the "participation ratio" increased from eighteen percent in 1991 to sixty-six percent in 1998). Utilization of dental services increased in Texas from 1996 to 1998 while, at the same time, the national average declined. Pet. App. 3a. And, the medical transportation budget increased by 300%. 5.SR.883. In 1993, about 750,000 medical transportation rides were provided, while in 1999 there were 2.5 million rides. 5.SR.884. The success of Texas's EPSDT program is best reflected by the fact that there was no evidence that *any* eligible individual requesting medical or dental services was denied those services. *See* Pet. App. 4a, 33a, 101a-02a & n.51; 11.R.3668.

Despite these tremendous advances, Frew filed a motion to enforce the consent decree in November 1998, contending that state officials had not complied with her interpretation of the decree. *See* Pet. App. 4a, 9a-10a; 5.R.1697. The state officials responded that they had

complied with the consent decree. The district court conducted an enforcement hearing in March 2000, 1.SR-6.SR, and, five months later, issued a 175-page decision agreeing with Frew. Pet. App. 54a. The district court rejected the state officials' contentions that the decree was largely unenforceable due to an absence of federal rights, that the State's sovereign immunity precluded the district court from enforcing the decree beyond the requirements of federal law, and that Frew's extraordinarily expansive interpretation of the decree's provisions was not supported by its text. 11.R.3628; Pet. App. 10a, 54a-275a.[4]

State officials appealed the order, which the Fifth Circuit stayed during the pendency of the appeal. Pet. App. 11a.[5] The Fifth Circuit vacated the district court's order and remanded the case. Pet. App. 46a. Recognizing the Eleventh Amendment's restriction on the district court's jurisdiction, the court of appeals held that the *Ex parte Young* doctrine permitted the district court to enforce the consent decree only to the extent of federal-law violations. Pet. App. 19a-28a. To determine whether Frew alleged decree violations to which the *Young* exception

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4. The district court did not direct that any particular class members receive medical services; rather, it embarked on a process of retooling the entire EPSDT program. *See, e.g.*, Pet. App. 196a n.136 (suggesting detailed oversight of the promptness with which the program's toll-free information lines are answered). As the court of appeals remarked, the district court "has become overseer of the State's Medicaid plan." Pet. App. 29a.

5. Notwithstanding the pending appeal and the stay, Frew successfully sought leave in the district court to file a supplemental complaint adding new claims regarding dental services. Pet. App. 11a. The district court denied the state officials' motion to dismiss the supplemental complaint on the basis that the decree-enforcement appeal divested the district court of jurisdiction to grant the motion to supplement. After state officials filed a second appeal from that ruling, the Fifth Circuit consolidated the two appeals. *Id.*

applied, the court of appeals considered whether Frew's allegations of decree violations implicated federal rights that the district court could enforce. Pet. App. 13a-19a, 33a-39a. The Fifth Circuit held that no enforceable rights were the subject of the district court's decision. Pet. App. 12a. The Fifth Circuit explained that "'in enforcing the consent decree,'" the district court had erred by regarding itself as "'bound *solely* by [the decree's] language,'" and by therefore concluding "that 'an interpretation of the decree must be based strictly on the language of the decree and *not* on the legal requirements of the Medicaid Act.'" Pet. App. 14a (quoting Pet. App. 71a) (emphasis added); *see also id.*, at 33a.

Because the district court decided that the consent decree, but not federal law, had been violated, the court of appeals concluded that the district court's invocation of its enforcement authority was not predicated on ongoing violations of federal law. Accordingly, it held that *Young* did not permit enforcement.[6]

SUMMARY OF THE ARGUMENT

Our Federalism respects the fundamental sovereignty of the States and precludes federal-court jurisdiction over the States absent clear and unambiguous consent. The *Ex parte Young* fiction—which deems injunctive suits against state officers not to be against the State—is a narrow exception to the Eleventh Amendment's constraints on

6. The Fifth Circuit did not reach the alternative grounds raised on appeal challenging the district court's construction of the consent decree. The state officials contended that the district court's enforcement of the decree should be reversed because it modified the decree's terms and held the state officials to requirements not reflected in the decree and never agreed to by the parties. The state officials maintained that under a proper reading of the decree, utilizing established rules of construction, there would be no basis to find violations.

federal judicial power. Justified by the Supremacy Clause, *Ex parte Young* affords federal jurisdiction only for the limited purpose of remedying ongoing violations of federal law.

In this case, the federal district court, which has been supervising the Texas youth Medicaid program since 1996 pursuant to a consent decree, ordered a plan of relief that would extend far beyond anything required by federal law. Authority for such broad relief, Frew urges, can be found in the general equitable powers of a district court to administer a consent decree, powers that have been elaborated upon by this Court in the context of civil rights suits against local municipalities.

A suit against a State is different. General equitable powers of a federal court do not trump the Eleventh Amendment. Rather, this suit has proceeded only under the *Ex parte Young* fiction, and the federal court has no jurisdiction under that doctrine beyond remedying ongoing violations of federal law. If federal law does not require it, a federal court may not order it.

The fact that state officials agreed to a consent decree does not alter those constraints. Absent an ongoing violation of federal law, the fundamental predicate for the *Ex parte Young* fiction is eliminated, and jurisdiction is lacking.

Were it otherwise, the *Young* fiction itself could be jeopardized by the serious structural constitutional infirmities that would result. As a basic tenet of state and federal separation of powers, one administration may not bind the next, one officeholder may not bargain away the constitutional authority of his or her successor. As a concomitant tenet of federalism, federal courts should not be administering and prescribing the day-to-day operations of state programs and agencies. To conclude that a state official, by agreeing to a consent decree, can endow a federal court with perpetual jurisdiction to direct the operation of state programs—irrespective of the requirements of federal law—and can divest future state

legislatures and executives of budget and policymaking authority over those programs, would run afoul of both federalism and separation of powers.

Limiting government by consent decree is not, as Frew suggests, detrimental to the interests of States. Settlements will still occur, by private agreements and by consent decrees consistent with federal law, without federal courts needing to be empowered to subject States to equitable remedies unmoored from the dictates of federal law. And, since the outer boundary of what a plaintiff could achieve litigating an *Ex parte Young* case to full victory on the merits is delimited already by the mandates of federal law, it would be untenable to say that plaintiffs must be able to get *more* than they could from full victory at trial in order to have an incentive to settle.

Nor is Frew's newest argument—that joining the consent decree waived Eleventh Amendment immunity altogether and rendered *Ex parte Young* irrelevant—consistent with this Court's jurisprudence. At the outset of this lawsuit, the State of Texas was a party. Texas moved to dismiss based on Eleventh Amendment immunity, and that motion was granted. All that remained was the *Ex parte Young* suit against the state officials, which proceeded to this day.

Texas law makes clear that only the Texas Legislature can waive the State's sovereign immunity. Given that the State had already prevailed on Eleventh Amendment grounds, it renders the *Ex parte Young* fiction a farce to claim that the remaining state officials—lacking any state authority to do so—could undo that dismissal.

Moreover, even if the Texas Attorney General were empowered to waive sovereign immunity, nothing he did constituted the clear and unambiguous statement that this Court requires for waivers of Eleventh Amendment immunity. And nowhere in the consent decree is there a provision purporting to waive such immunity.

The Court's recent *Lapides* decision is not to the contrary. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*,

535 U.S. 613 (2002). *Lapides* is limited to the narrow question of removal of a state-law claim, for "which the State has explicitly waived immunity from state-court proceedings." *Id.*, at 617. At issue here instead are federal-law claims for which the Texas Legislature has not waived sovereign immunity. And in *Lapides* the Court deemed the State's removal of the case to federal court to be invoking the jurisdiction of that court; here, in contrast the State was haled into federal court as a defendant, and the state officials entered the decree in an attempt to avoid a federal court adjudication and end the litigation. Moreover, in *Lapides*, the Court reaffirmed its insistence that any waiver of sovereign immunity be both clear and voluntary. *Id.*, at 620.

In splitting the atom of sovereignty, the Framers never envisioned that the federal government would seize the mantle of directly running state agencies. Madison, and Montesquieu before him, did foresee the risk that judges might assume "'legislative and executive powers . . . united in the same person,'" THE FEDERALIST, NO. 47,[7] and the Constitution guards against that peril. Together, federalism and separation of powers ensure that federal courts cannot do what the district court has attempted—to use a consent decree to take over a state program and dictate its daily operation, freed in equity from the constraints of federal law.

ARGUMENT

I. THE *EX PARTE YOUNG* EXCEPTION TO THE ELEVENTH AMENDMENT DOES NOT PERMIT ENFORCEMENT OF CONSENT-DECREE PROVISIONS THAT EXCEED THE REQUIREMENTS OF FEDERAL LAW.

The Eleventh Amendment constrains a federal court's jurisdiction over a suit against an unconsenting State, and

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7. THE FEDERALIST NO. 47, at 338 (James Madison) (Benjamin F. Wright ed., 1961) (quoting Montesquieu).

the existence of a consent decree does not remove that constitutional limitation on a federal court's equitable powers. The exception to the Eleventh Amendment afforded by *Ex parte Young* permits federal courts to remedy state officials' alleged violations of federal law, but it does not empower courts to impose obligations on States in excess of what federal law requires. Absent an ongoing violation of federal law, a federal court lacks authority to regulate state officials' conduct, and both federalism and separation-of-powers principles preclude the free-ranging enforcement power Frew advocates.

A. The *Ex parte Young* Doctrine Is a Limited Exception to the Sovereign States' Eleventh Amendment Immunity from Suit.

Although the Constitution establishes a national government, it also specifically recognizes the States as sovereigns in their own right. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 (1996). The Constitution assumes the States' "continued existence and active participation in the fundamental processes of governance," and, through the grant of only limited and enumerated powers to the branches of the national government, "underscores[s] the vital role reserved to the States by constitutional design." *Alden v. Maine*, 527 U.S. 706, 714 (1999).

A fundamental aspect of state sovereignty is immunity from suits by individuals absent the State's express and unequivocal consent. *See, e.g., id.*, at 712-14; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999). This residuary and inviolable attribute of sovereignty includes a specific immunity from suit in federal court that is confirmed by the Eleventh Amendment. U.S. CONST. amend. XI (withholding the "judicial power" of the federal courts from "any suit in law or equity . . . against one of the United States by Citizens of another State"); *see also Hans v. Louisiana*, 134 U.S. 1 (1890).

Certain limited circumstances exist, however, under which federal courts may exercise jurisdiction over suits alleging that state officials are committing ongoing violations of federal law. Although such official-capacity suits are typically deemed suits against the State barred by the Eleventh Amendment, the Court recognized an exception to this rule in *Ex parte Young*, 209 U.S. 123 (1908), which permits official-capacity suits against state officials to proceed when the suit seeks prospective injunctive or declaratory relief from an ongoing violation of federal law. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *Kentucky v. Graham*, 473 U.S. 159, 166, 167 n.14, 169 n.18 (1985); *Pennhurst State Hosp. v. Halderman*, 465 U.S. 89, 99, 114 n.25 (1984); *Young*, 209 U.S., at 158-60.

Young's exception rests on the notion that state officials' acts in contravention of federal law are *ultra vires* and, therefore, not attributable to the State. 209 U.S., at 159-60. By creating the "fiction" that such suits are not brought against the State and, consequently, do not implicate the Eleventh Amendment, *Young* reconciles state sovereignty with federal-law principles enforceable against the States through the Supremacy Clause. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S., at 104-05.[8]

The justification for *Young*'s exception to the Eleventh Amendment, however, exists only when a plaintiff suing the State alleges ongoing violations of federal law. *See Green*, 474 U.S., at 68. Absent this predicate, the state officials' acts are not *ultra vires*, and an official-capacity

8. The Court originally limited the *Young* exception to suits alleging violations of federal constitutional rights, 209 U.S., at 159-60, but later extended it to encompass suits alleging violations of federal statutory law as well. *See Pennhurst*, 465 U.S., at 105-06.

suit remains a suit against the State that is barred by the Eleventh Amendment. *See Kentucky*, 473 U.S., at 169.

B. The Material Jurisdictional Inquiry for Enforcement of a Consent Decree Is Whether the Motion to Enforce—Not the Underlying Complaint—Identifies an Ongoing Violation of Federal Law.

Frew and the United States erroneously contend that Frew's 1993 complaint in the underlying lawsuit provides jurisdiction for the district court to enforce the consent decree because the complaint initially alleged violations of federal law (*i.e.*, the Medicaid Act). *See* Pet'r Br., at 34-37, 43; U.S. Br., at 22-23. An enforcement action, however, "is more than just a continuation or renewal of the [original] suit, and hence requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994). Accordingly, the material inquiry is whether the motion to enforce provisions of the decree alleges violations of federal law, not whether Frew's underlying complaint properly invoked *Young* jurisdiction at the time the suit was filed. *See id.*, at 380-81 (evaluating the trial court's "ancillary jurisdiction" by considering the dismissal order and parties' settlement agreement, not the underlying complaint); *cf.*, *e.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995).

Nor, contrary to Frew's and the United States's assertions, does *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 649 (2002), suggest that Frew's 1993 complaint created jurisdiction for the district court to enforce the decree. Pet'r Br., at 36; U.S. Br., at 22-23. *Verizon* did not involve a consent decree or a settlement agreement. Rather, the Court analyzed whether a federal court could entertain a suit for injunctive relief against state utility commissioners who the plaintiffs alleged were violating federal telecommunications law. 535 U.S., at 638. Because the issue was whether the suit could proceed in the first

instance, the Court understandably examined the allegations in the complaint. *Id.*, at 646. In a suit involving enforcement of a consent decree, by contrast, the issue is not the court's jurisdiction at the time the underlying suit was filed, but its ability to enforce provisions of the decree that resolved the suit. Thus, the motion to enforce, not the complaint, provides the benchmark against which jurisdiction must be measured.[9]

Frew and the United States also place substantial reliance on *Gunter v. Atlantic Coast Line Railroad*, 200 U.S. 273 (1906), for the proposition that "the Eleventh Amendment has no application to an ancillary proceeding to enforce a judgment against a State, as long as the Court legitimately acquired jurisdiction over the State in the original proceeding. . . . " U.S. Br., at 7; *see also* Pet'r Br., at 33. But *Gunter* was a case that was fully adjudicated on the merits. 200 U.S., at 278-79. The trial court found and enjoined an ongoing violation of federal law, and, years later, this Court ruled that the trial court retained jurisdiction *to prevent that violation of federal law*. *Id.*, at 292. Thus, contrary to Frew's and the United States's argument, *Gunter* is entirely consistent with the State's argument that federal jurisdiction exists only to prevent ongoing violations of federal law.

As with any other jurisdictional constraint, the Eleventh Amendment's limitation of a federal court's

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9. Frew misplaces reliance on *Suter v. Artist M.*, 503 U.S. 347 (1992), in suggesting that the Court determines jurisdiction over consent decrees by reference to allegations in the complaint. *See* Pet'r Br., at 37. *Suter* is inapposite. It did not consider or discuss Eleventh Amendment immunity. It did not speak one word about the proper source of jurisdiction for consent decrees, in the complaint or otherwise. Indeed, *Suter* did not even involve a consent decree, and the only mention of one was in a single footnote, which noted in reference to a consent decree in another case that "[that] consent decree has no bearing on the issue the Court decides today." *Suter*, 503 U.S., at 354 n.6.

equitable powers endures throughout a federal-court action. *Cf.*, *e.g.*, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (observing, in the context of mootness, the requirement that jurisdiction must exist at all stages of a case). The mere filing of a complaint that includes *Young* allegations does not perpetuate federal jurisdiction for all time and all purposes. Instead, when plaintiffs ask a federal court to impose obligations on state officials—here through Frew's motion to enforce the consent decree—a federal court must determine whether the specific request implicates an ongoing violation of federal law. If not, *Young* does not provide jurisdiction for an enforcement action.[10]

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10. Although one of the questions presented, as framed by Frew, asks whether decree enforcement depends on a "violation of a federal right remediable under §1983," Pet'r Br., at i, Frew does not identify a single decree provision for which the court of appeals found an ongoing violation of federal law but denied enforcement because a federal "right" was lacking. In fact, the court of appeals examined whether Frew's enforcement action alleged violations of federal law; and, because it did not, the court determined that *Young* jurisdiction was lacking. *See* Pet. App. 28a-39a.

The material issue is not the enforceability of violations of federal law as opposed to violations of federal rights, as the AARP *amici* erroneously suggest, *see* AARP Br., at 24, but whether a court may order broad equitable remedies unconnected to an ongoing violation of federal law. Although the Fifth Circuit referenced established standards for determining if a federal statute confers a "federal right," those standards merely ensure the existence of a "binding obligation" intended to benefit the plaintiff. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 510-11 (1990); *see also Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). As such, federal-rights analysis mirrors traditional standing requirements applicable in any suit. *Compare Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (quoting 42 U.S.C. §1983) (rejecting the notion that a federal right exists when a plaintiff "falls within the general zone of interest that the statute is intended to protect" because "broad[ ] or vague[ ] 'benefits' or 'interests' " are not enforceable federal rights), *with Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (explaining that a party establishes standing by showing "an invasion

Because EPSDT programs are creatures of both state and federal law, an alleged violation of a program provision may, or may not, constitute a violation of federal law. All aspects of the EPSDT program not required by federal law are matters of state law and state policy—left to the State's discretion in formulating its plan for submission to the Secretary of Health and Human Services. *See* 42 U.S.C. §1396a(a) & (b); *see also*, *e.g.*, *Alexander v. Choate*, 469 U.S. 287, 307 (1985) (noting "the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid"). Accordingly, Frew's attempt to enforce consent-decree provisions not required by federal law would require a federal court to second-guess state decisions effected through state statutes, regulations, and executive policies. Because the Eleventh Amendment precludes such use of federal judicial power, *see Pennhurst*, 465 U.S., at 106, the Fifth Circuit correctly held that the district court lacked jurisdiction to entertain Frew's enforcement claims.[11]

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of a legally protected interest that is concrete and particularized and actual and imminent"). Moreover, federal-right and *Young* analyses overlap to the extent both focus on the dictates of federal law. Just as 42 U.S.C. §1983 "provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States," *Gonzaga*, 536 U.S., at 283 (quoting 42 U.S.C. §1983), *Young* permits a federal court to exercise jurisdiction only to remedy federal-law violations, *Green*, 474 U.S., at 68. The Fifth Circuit never indicated, however, that there were any provisions of the decree required by federal law that could not be enforced because they did not additionally implicate federal "rights."

11. Frew's *amici* also attack the court of appeals's judgment by challenging Fifth Circuit precedent distinguishing a district court's power to enter a decree from its power to enforce a decree. *See* U.S. Br., at 8, 22; AARP Br., at 13 (criticizing *Lelsz v. Kavanagh*, 807 F.2d 1243 (CA5 1987), and *Saahir v. Estelle*, 47 F.3d 758 (CA5 1995)), which distinguished the decree-entry standards suggested in *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S.

C. A Consent Decree Does Not Expand the *Young* Exception to Eleventh Amendment Immunity.

Although a federal court has inherent equitable power to issue injunctive relief and "to manage its proceedings, vindicate its authority, and effectuate its decrees," *Kokkonen*, 511 U.S., at 380-81, that power does not supersede the constitutional constraints on jurisdiction imposed by the Eleventh Amendment.[12] Therefore, the Court should reject Frew's attempt to transform a court's equitable powers into a license to enforce all consent-decree provisions against a State—even when those provisions impose obligations that exceed federal-law requirements and, consequently, lie beyond a federal court's limited jurisdiction under *Ex parte Young*. *Cf. Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 398-99 (1982) (recognizing that "fundamental limitations on the remedial powers of federal courts" permit the exercise of such powers "only on the basis of a violation of

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501 (1986), from enforcement standards in a *Young* suit). In this case, however, the court of appeals did not rely on any distinction between entry and enforcement power. Rather, the court focused on the extent to which the Eleventh Amendment constrains efforts to enforce a decree against state officials through a *Young* suit. Thus, this Court need not decide whether different standards govern entry and enforcement of consent decrees—either in general or in the context of a suit against a State—because Frew's suit implicates only the constitutional limitations on a federal court's enforcement power when a plaintiff seeks to impose obligations on a State that exceed requirements under federal law.

12. For this reason, the United States's reliance on *Kokkonen*'s discussion of enforcing preexisting court orders, U.S. Br., at 16 (citing *Kokkonen*, 511 U.S., at 381), is unpersuasive; *Kokkonen* was considering ancillary jurisdiction over court orders generally, not injunctive orders addressed to sovereign States, for which jurisdiction depends on continued compliance with *Ex parte Young*.

the law" with remedies that "extend no farther than required by the nature and the extent of that violation").

Frew erroneously proposes that litigants' agreement to a settlement by court order obviates the need for further consideration of Eleventh Amendment constraints on an enforcement action against a State, provided that: (1) the underlying settlement resolves a dispute over which the court initially had subject-matter jurisdiction; (2) the enforcement action requests relief in the "general scope" of the original allegations; and (3) enforcement promotes the "objectives" of the federal law on which the underlying suit was based. *See* Pet'r Br., at 42-43. Such loose criteria ignore the narrow justification for the *Young* fiction, which creates an exception to the Eleventh Amendment for the sole purpose of vindicating supreme federal law. *See supra* Part I.A.

By making the terms of the parties' settlement agreement dispositive of the court's jurisdiction, Frew's contract rationale is not susceptible to objective limitations. *Cf. Jenkins*, 515 U.S., at 98-99 (noting the district court's limitless authority and "numerous policy choices" when it moved beyond curing constitutional violations). The Court should reject Frew's proposed approach because a federal court is "more than a recorder of contracts from whom parties can purchase injunctions." *Firefighters*, 478 U.S., at 525 (citation and quotation omitted). Although a consent decree has some attributes of a contract, *see, e.g., United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975), it is nonetheless a judgment predicated on the Article III power of the federal court. *See, e.g., Pope v. United States*, 323 U.S. 1, 12 (1944); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). And, when a decree settles a *Young* suit against state officials, the federal court's Article III power—and, necessarily, its enforcement power—cannot exceed the jurisdictional constraints of the Eleventh Amendment or the limited exception to state immunity that *Young* affords.

Frew's contract-based enforcement theory also ignores that a federal court's power to adopt a consent decree does not derive from the parties' consent but "comes only from the statute which the decree is intended to enforce." *Ry. Employees v. Wright*, 364 U.S. 642, 651 (1961). In *Wright*, for example, employees sued under a provision of the Railway Labor Act prohibiting discrimination against non-union workers, and the suit resulted in a consent decree forbidding such discrimination. When Congress subsequently amended the Act to permit union shops, a union moved to modify the decree to reflect the change in federal law. Although lower courts reasoned that the agreement was enforceable because non-union shops remained legal, the Court held that failure to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights." *Id.*, at 648. The parties' agreement to the decree did not suffice because "it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. . . . The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.*, at 651-52; *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984).

Frew's theory that a federal court should have enforcement jurisdiction to prevent state officials from breaking a contractual commitment depends on an unsupportable contractual theory of federal judicial power.[13] A district court's authority to modify a decree

13. Frew also hints at some type of estoppel theory but has never identified, much less satisfied, the elements of estoppel, which include affirmative misconduct and detrimental reliance. *See, e.g., Heckler v. Cmty. Health Servs. of Crawford County*, 467 U.S. 51, 67 (1984); *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 309 (Tex. 1936). Moreover, estoppel arguments do not apply to sovereign States. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419 (1990) (noting "[f]rom our earliest cases, we have recognized that equitable estoppel will not lie against the government"); *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970).

"cannot be resolved solely by reference to the terms of the decree and notions of equity." *Id.* Moreover, enforcement of a decree entered in a *Young* suit should not be undertaken lightly because it entangles an arm of the national government in another sovereign's governance by requiring continuing supervision by a federal court. *See infra* Part I.D; *cf. Jenkins*, 515 U.S., at 98 (noting the "federalism concerns that are implicated when a federal court issues a remedial order against a State"); *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976) (same). The affront is most severe when enforcement actions coerce state officials into assuming obligations not required by federal law, as such obligations interfere with a State's authority to "order the processes of its own governance" and offend the States' "inviolable sovereignty." *Alden*, 527 U.S., at 752.[14]

14. Frew contends that the district court should have the power to enforce the decree provisions at issue to preserve the federal courts' "integrity." Pet'r Br., at 16. But when no constitutional or federal statutory violation is alleged, judicial integrity is not impugned. Nor, as Frew's *amici* erroneously contend, do alleged violations of a decree equate with violations of "federal law" when the terms of the decree are not required by federal law. If that view prevailed, a federal court could invest itself with unlimited jurisdiction simply by entering a broad decree, rendering irrelevant the dictates of federal constitutional and statutory law as well as *Young*'s constraints on federal-court jurisdiction over a sovereign State.

Moreover, while the Court has utilized *Young* to enforce the federal Constitution, *see* 209 U.S., at 159-60, and federal statutory law, *see Pennhurst*, 465 U.S., at 105-06, *Young* has not served as a vehicle for vindicating court orders generally, and the Court should decline Frew's invitation to expand *Young* to permit enforcement of consent decrees against States that do not implicate violations of federal law. Federal decrees were never conceived as permanent displacements of state and local administration of programs. *See, e.g., Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991) ("[F]ederal supervision of

Finally, *Firefighters v. City of Cleveland*, on which Frew relies heavily, does not support her contract-based theory of enforcement or the district court's exercise of enforcement powers in this case.[15] Critically, suit in *Firefighters* was brought against a city, not a State. Thus, *Firefighters* was not a *Young* suit seeking entry, much less enforcement, of a consent decree imposing obligations on a State in excess of federal law.[16] Accordingly, the Court had no occasion to consider the permissible parameters of an enforcement action in a *Young* suit. Instead, *Firefighters* was a statutory-construction case that addressed whether a consent decree in a Title VII suit against a city was an "order of the court" that, under that statute's terms, could not provide relief for individuals who were not the actual victims of a defendant's discriminatory practices. 478 U.S., at 514 & n.5, 515. The Court reasoned that the decree did not fall under Title VII's statutory prohibition because Congress did not intend to restrict employers from

local school systems was intended as a temporary measure to remedy past discrimination"). Instead, the overarching goal of a federal decree should be the "eventual restoration" of state control. *Jenkins*, 515 U.S., at 88. Limiting enforcement actions to violations of federal law ensures that federal courts will not retain unwarranted control of state programs that should be administered instead by state officials.

15. To decide that it had jurisdiction to enforce the decree violations it identified, the district court first concluded that its original entry of the decree was proper under *Firefighters*, Pet. App., at 247a, then reasoned that, because entry was proper, broad enforcement powers necessarily followed. Pet. App., at 260a.

16. Because *Firefighters* did not involve an enforcement action, or a suit against a State, the Court's statement in *dicta* that "a federal court is not necessarily barred from *entering* a consent decree merely because the decree provides broader relief than the Court could have awarded after a trial," *Firefighters*, 478 U.S., at 525 (emphasis added), is of little service to Frew, who seeks to *enforce*—against a State—provisions of a consent decree that exceed federal-law requirements.

entering into voluntary agreements to resolve Title VII disputes. *Id.*, at 521-24.[17]

Frew and her *amici* also misplace reliance on the Court's statement in *Rufo v. Inmates of Suffolk County Jail* that a court may enter a consent decree in which the parties undertook "to do more than the Constitution requires . . . but also more than what a court would have ordered absent the settlement." 502 U.S. 367, 389 (1992); *see* Pet'r Br., at 38. *Rufo* concerned the proper standard for *modification* of consent decrees in institutional reform litigation—not jurisdiction to enforce such decrees. Moreover, like *Firefighters*, *Rufo* did not address the limitations imposed by the Eleventh Amendment and the *Ex parte Young* doctrine.

In other decisions, the Court has recognized limitations on federal courts' remedial authority to enter consent decrees that result in federal oversight of state and local governments. In *Milliken v. Bradley*, for example, the Court recognized three guiding principles for a federal court's exercise of its remedial authority: (1) the remedy must be defined by the nature and scope of the federal-law violation; (2) the decree must be remedial in nature; and (3) the decree "must take into account the interests of state and local authorities in managing their

17. Although the United States now argues that a "court has inherent authority to enforce a valid decree," U.S. Br., at 22, and that a consent decree that satisfies the *Firefighters* factors may provide broader relief than that available in a litigated judgment, U.S. Br., at 14, that position directly contradicts the United States's position in *Firefighters* itself. Consistent with Respondents' arguments against Frew's enforcement attempt, the United States contended in *Firefighters* that a district court's remedial authority to enter a consent decree extends only as far as necessary to remedy a violation of federal law and that the *Firefighters* decree was void because the district court would have lacked the power to order such a judicial decree had the matter gone to trial. *See* U.S. Br., *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 1985 WL 670128, at *22 (Jul. 2, 1986).

own affairs, consistent with the Constitution." 433 U.S., at 280-81; *accord Jenkins*, 515 U.S., at 88.[18] In a case like Frew's, in which a consent decree against state officials contains no admission or adjudication of liability under federal law, the district court's power should remain directly tied to alleged federal-law violations to ensure that the decree is truly remedial in nature and that it respects the State's authority to manage its own governmental affairs. *Cf. Taylor v. Freeman*, 34 F.3d 266, 269 (CA4 1994) (explaining that far greater judicial caution is necessary when ordering injunctive relief against state officers prior to an adjudication on the merits).

D. Eroding the Federal-Law Basis for *Young* Would Raise Federalism and Separation-of-Powers Concerns.

Extending federal-court jurisdiction beyond the constraints of *Young*, and allowing equitable orders against States to do more than remedy ongoing violations of federal law, would go a long way toward making "the Eleventh Amendment, and not *Ex parte Young*, . . . the legal fiction." *Verizon*, 535 U.S., at 649 (Kennedy, J., concurring). Indeed, as one Member of the Court has observed, "[t]wo clear restraints on the use of the equity power—federalism and the separation of powers—derive from the very form of our Government. Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States." *Jenkins*, 515 U.S., at 131 (Thomas, J., concurring).

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18. Moreover, the Framers did not intend Article III to imbue federal courts with the limitless equitable power envisioned by Frew. *See Jenkins*, 515 U.S., at 126-27 (Thomas, J., concurring) (concluding, in reviewing Federalist and Anti-Federalist exchanges about the scope of Article III equity power, that "the drafters and ratifiers of the Constitution approved the more limited construction").

1. The exercise of the federal judicial power under *Young* should respect the separation of powers of state governments.

To ensure that the doctrine of sovereign immunity remains meaningful, *Young* should not be expanded to permit a federal court's enforcement jurisdiction to ignore the distinct legislative and executive roles assigned by a State's constitution, as the district court did in this case. *Cf. Alden*, 527 U.S., at 751 (counseling against federal assertions of authority that blur the "branches of the state governments, displacing state decisions that go to the heart of representative government") (quotation and citation omitted); *see also Jenkins*, 515 U.S., at 88.

Moreover, serious separation-of-powers concerns arise when one state officeholder is empowered through a federal court to bind his or her successors and to bargain away their constitutional authority.[19] As Judge Easterbrook explained in his plurality opinion for the en banc Seventh Circuit, consent decrees can be used to evade political accountability and the allocation of powers in representative government:

> "'Chicago' did not reach a settlement with the plaintiffs. . . . Negotiations were conducted on Chicago's behalf by its corporation counsel, who we may suppose acted with the approval of [the mayor]. Although the decree purports to last for all time . . . democracy does not permit public officials to bind the polity forever. What one City Council enacts, another may repeal . . . . Today's

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19. *See* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295 (1987) (explaining that consent decrees that deny future officeholders their constitutionally vested policymaking authority enable officials to sidestep structural limitations on their own authority).

lawmakers have just as much power to set public policy as did their predecessors. 'Chicago' speaks through its elected representatives, and the people are free to upset even the most enlightened policies of earlier times. . . .

"Governments are in this respect unlike corporations or other contracting parties. A corporate board of directors may enter into commitments that continue after new directors take office; a legislature may not. True, governments may form contracts (for example, to build a new road or repay a loan) and must keep these commitments by virtue of the contract clause of the Constitution, Art. I, §10, cl. 1. But temporary officeholders may not contract away the basic powers of government to enact laws—or in this case to adopt budgets—in the same way natural persons may make enduring promises about their own future behavior. Why then should things differ if the parties choose not the device of a seal (or even of a statute) but the imprimatur of a district judge?" *Evans v. City of Chicago*, 10 F.3d 474, 478 (CA7 1993) (en banc) (plurality op.) (citations omitted).

Not only would expanding *Young* beyond federal-law violations improperly allow one officeholder to bind the next, it would permit state executive officers unconstitutional latitude to bind their legislatures. *Cf. Jenkins*, 515 U.S., at 131 (Thomas, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds at the expense of other citizens, other government programs, and other institutions not represented in court.").

The Texas Constitution does not extend legislative powers to executive officials.[20] *See* TEX. CONST. art. II, §1 ("no person" of one of the "three distinct departments" "shall exercise any power properly attached to either of the others"). Yet the district court here sought to enforce the consent decree—without the justification of any ongoing violations of federal law—in a manner that would enshrine in perpetuity an obligation to expend considerable resources on endeavors not required by federal law and not tied to the policymaking choices of the Texas Legislature.[21]

Respect for the structural limitations on state officials' authority, and their role in preserving the character of a republican form of government, is particularly important when resolving litigation by consent decree. Institutional reform litigation has been known to foster friendly adversaries:

> "There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation, or other policy goal for the institution. An adverse decree that would require additional spending is also a weapon

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20. Frew suggests that other officials and individual legislators had the opportunity to approve the decree. Pet'r Br., at 23. The record, however, does not reflect any such approvals, and, in any event, it is the Legislature as a whole—through passing legislation—that is the proper organ of democratic accountability.

21. *See, e.g.*, Special Joint Meeting of the Texas House of Representatives Committee on Public Health and Appropriations Health and Human Services Subcommittee (Sept. 21, 2000) (audiotape on file with Texas House of Representatives Media Office) (comment by Representative Harvey Hilderbran that district court's order requires diversion of financial resources from EPSDT program to satisfy data reporting requirements of decree that go beyond the federal reporting system).

> used by officials to augment their budget. . . . Whether the defendants' friendly view of the suit derives from policy preferences or budgetary aspirations, the decree becomes a shortcut around political constraints." Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1294 (footnote omitted); *see also Milliken*, 433 U.S., at 293 (Powell, J., concurring) (explaining that parties to a consent decree are known to have "joined forces apparently for the purpose of extracting funds from the state treasury").

Because consent decrees can be used to evade the political power of other branches and levels of government, a federal court must exercise its powers in a way that respects the federalist structure of the Constitution.[22] Otherwise, the federal judicial power would impermissibly "deprive the legislature of the power of judging what the honor and safety of the state may require," which is an offense to sovereignty "attended with greater evils" than

22. *See, e.g., Evans*, 10 F.3d, at 479 (plurality op.) ("[T]he court must ensure that . . . the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder. When making these inquiries, courts are bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance."); *Washington v. Penwell*, 700 F.2d 570, 573 (CA9 1993) (setting aside consent decree provision because state officials lacked authority under Oregon's Constitution to commit funding for prison legal services because that was a legislative decision); *Overton v. City of Austin*, 748 F.2d 941, 956-57 (CA5 1984) (affirming district court's refusal to adopt consent decree in which city council agreed to change from an at-large to a single-member district system when state law required a popular vote for such a change, explaining that parties' consent did not supply a sufficient basis).

failure to enforce a consent decree no longer required by federal law. *Hans*, 134 U.S., at 21.

2. Maintaining *Young*'s constraints ensures that federal courts operate within the bounds of federalism and separation of powers.

In our federal system, federal courts should not be making fundamentally legislative and executive decisions regarding the priorities of a State and its agencies by compelling program design, allocating the State's limited resources, or determining how to deliver public services. When a federal court does so, "[t]he substitution of government by the federal judiciary for local self-government involves dangerous disproportionality" inconsistent with the distribution of national powers. Robert Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978).

These limitations derive not only from federalism, but also from federal separation-of-powers principles:

> "The separation of powers imposes additional restraints on the judiciary's exercise of its remedial powers. To be sure, this is not a case of one branch of Government encroaching on the prerogatives of another, but rather of the power of the Federal Government over the States. Nonetheless, *what the federal courts cannot do at the federal level they cannot do against the States*; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers." *Jenkins*, 515 U.S., at 132-33 (Thomas, J., concurring) (emphasis added); *see also id.*, at 113 (O'Connor, J., concurring).

The exercise of judicial power involves adjudicating controversies. By contrast, judicial decrees dictating budgeting, staffing, data collection, recruitment,

administrative oversight, and monitoring involve decidedly legislative or executive, rather than judicial, powers. It is the fundamentally political nature of these types of decisions that distinguishes them from judicial determinations. If federal courts venture into political decisions that are the purview of state governments, "they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise." *Jenkins*, 515 U.S., at 133 (Thomas, J., concurring).[23]

That lack of expertise is hardly in doubt. As the court of appeals correctly noted, federal courts are simply not equipped to administer an indigent-youth health-services program.[24] *See* Pet. App. 4a. Courts, by their nature, lack the capabilities of state government to develop and deliver social services programs. *See Jenkins*, 515 U.S., at 112 (O'Connor, J., concurring). ("Courts . . . are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for

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23. Indeed, this specter is a far greater threat to the integrity of the courts, *see* Pet'r Br., at 16; U.S. Br., at 5, than would be maintaining the constitution limits on the court's authority over sovereign States.

24. In fact, Congress's design for the EPSDT program assumed that the States and the U.S. Secretary of Health and Human Services had the appropriate capacity. Congress requires each participating State to develop a Medicaid plan, which must be approved by the Secretary prior to implementation. *See* 42 U.S.C. §1396a(b). In addition, Congress established remedial mechanisms to address any shortcomings of States. The Secretary may curtail or limit federal payments to States that do not substantially comply with federal Medicaid requirements. *See* 42 U.S.C. §1396c. Congress also mandated a hearing procedure for recipients. 42 U.S.C. §1396a(a)(3); 42 C.F.R. §431.200 *et seq.*; *see also* 1 TEX. ADMIN. CODE §357.1-.29. Under the district court's interpretation, however, a consent decree overseen by a federal court will be perpetually substituted for Congress's planned remedial scheme.

societal ills."). State governments not only properly bear the responsibility for such programs, but they are better able to make the day-to-day policy, program, and funding choices necessary to deliver social services. *See, e.g., id.*, at 132 (Thomas, J., concurring) (observing that federal courts "simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies.").

As this Court has noted with respect to federal prison injunctions, in recent years, federal courts have

> "become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell v. Wolfish,* 441 U.S. 520, 562 (1979).

The institutional inability of federal courts to shoulder such tasks is accompanied by a decided lack of political accountability, leaving federal courts without the guidance of the state electorate's mandate or the State's fiscal priorities. Any presumption that federal courts should make public policy choices, allocate financial resources, and set effective administrative policy is at odds with the adjudicatory nature of the judicial power. "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Jenkins*, 515 U.S., at 132 (Thomas, J., concurring); *see also id.*, at 113 (O'Connor, J., concurring) (agreeing with Justice Thomas's separation-of-powers concerns).

E. Consent Decrees Will Not Lose Their Utility in the Absence of the Enforcement Power Advocated by Frew.

Allowing federal courts to exercise their equitable powers as broadly as Frew desires would permit federal courts to escape their ordinary constraints, and, in the process, may actually reduce the incentives for settlement by consent decree. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 336 (1988) ("Any consent decree model that gives the courts an overly active role will unnecessarily inhibit parties from settling by consent decree."). Frew complains that there would be little value to a decree that is limited to federal law under *Young*. Pet'r Br. 42. Yet compliance with federal law is ostensibly the precise objective of her lawsuit; accomplishing that end should, at minimum, be a satisfactory result.

In any event, incentives for consent decrees will remain even if they are subject to the limitations imposed by the Constitution. They will remain an exit strategy for parties wishing to avoid binding or adverse rulings. *See, e.g., Rufo*, 502 U.S., at 383 (explaining that easing the standard for modification of consent decrees would not deter consent decrees because parties will still prefer to avoid trial and a potential loss on the merits); *see also Evans*, 10 F.3d, at 482 (plurality op.) ("Recognizing that a substantial federal claim must undergird a consent decree does not make plaintiffs less willing to settle: the decree still provides relief, [and] ... [p]laintiffs' alternative remains a trial, at which they might lose everything or obtain less suitable relief.").

Frew suggests that maintaining the existing limits on *Ex parte Young* suits may ultimately be detrimental to the interests of the States. *See, e.g.*, Pet'r Br., at 20. The State

of Texas and the *amici* States disagree. The States will retain ample ability to settle litigation without ceding to federal courts the authority to run state agencies unrestrained by the limits of federal law.[25] Moreover, since the maximum relief plaintiffs could hope for at trial would be a prospective injunction against ongoing violations of federal law, *Green*, 474 U.S., at 68, it would be a perverse incentive indeed to offer greater relief from settlement than from full victory on the merits.[26]

Frew's real complaint is that limiting the federal judicial power to remedying violations of federal law may impose a litigation burden on plaintiffs because they will have to demonstrate that a decree violation constitutes a federal-law violation in order to obtain enforcement. Pet'r Br. 41-42. Such a jurisdictional showing is hardly an unreasonable prerequisite. And it is certainly no different from the many jurisdictional disputes parties litigate in district courts. Moreover, the requirement does not necessitate a trial on the merits, as Frew claims, Pet'r Br. 41, and in any event, plaintiffs must always demonstrate violations before a federal court orders compliance. *See, e.g.*, 1.SR-5.SR (transcript of enforcement hearing).

And any fear that Medicaid recipients will be left without remedies if federal courts cannot enforce consent decrees as broadly as Frew hopes is unwarranted. The United States can ensure the States' compliance with

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25. Of course, parties wishing to escape the strictures of the Constitution on a federal court's remedial authority can always settle a case on their own terms and file a stipulation of dismissal. *See* FED. R. CIV. P. 41(a)(1).

26. By analogy, were a plaintiff auto-accident victim to sue a defendant for $100,000, no one would maintain that the defendant would need to be able to offer $200,000 in settlement in order to provide sufficient incentive to settle. Typically, settlements—which eliminate the risk of an unfavorable adjudication—are for less than full recovery, not more.

federal Medicaid law in at least two ways. If not satisfied with a State's performance of its Medicaid obligations, it can sue that State. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965). In addition, Congress has charged the Secretary of Health and Human Services with monitoring each participating State's performance of its Medicaid plan, and extended to the Secretary the power to enforce program requirements by terminating or limiting the payment of federal funds. *See* 42 U.S.C. §1396c. There is also a state administrative hearing process for individuals to complain about services. *See* 42 U.S.C. §1396a(a)(3); 42 C.F.R. §431.200 *et seq.*; 1 TEX. ADMIN. CODE §357.1-.29. The ability of the United States to file suit, of the Secretary to withhold funds, of claimants to request state hearings, and of litigants to proceed under *Young*—along with the good faith efforts of the States—together ensure that States will continue to uphold federal law.

Ultimately, the only settlements likely to be seriously inhibited are those in which state officials choose to bargain away matters left to the State's discretion through its republican form of government, rather than face the consequences of litigation. Curtailing such settlements is not regrettable. The constitutional considerations that preclude the enforcement of the alleged decree violations at issue in this case far outweigh any possible deterrence to the frequency of consent decrees. "[P]reserving democratic governance, separating the judicial and political spheres, [and] respecting state autonomy in the absence of a federal rule" all take priority over any preference to assign institutional reform of state programs to federal courts. *Evans*, 10 F.3d, at 482 (plurality op.).

II. THE STATE DOES NOT CONSENT TO SUIT IN FEDERAL COURT WHEN STATE OFFICERS AGREE TO SETTLE AN *EX PARTE YOUNG* CASE THROUGH A CONSENT DECREE.

Perhaps fearing that her expansive view of the district court's enforcement jurisdiction may not carry the day,

Frew asserted for the first time after briefing in the Fifth Circuit that the State of Texas waived its Eleventh Amendment immunity through a particular paragraph in the consent decree. She now advances a different argument—that the state officials' decision overall to settle the case by consent decree waived the protections of the Eleventh Amendment. *See* Pet'r Br., at 26. The Court should not consider these belated arguments. And, if it does, Frew's arguments fail for several reasons.

Frew's contention cannot survive the fact that the State invoked the protections of the Eleventh Amendment early in the case and was dismissed on those grounds. In addition, the state officials' agreement to a consent decree in this *Ex parte Young* suit did not constitute a clear and voluntary invocation of the federal court's jurisdiction on behalf of the State. And the language of the consent decree, to which the State was not a party, falls far short of manifesting a clear and unequivocal intent by the State to waive its Eleventh Amendment immunity. Lastly, no valid waiver of immunity could have occurred because any semblance of an implied consent to suit in federal court was not authorized by Texas law, and a contrary finding would disregard the constitutional principles supporting the political accountability of state governments.

A. Frew Defaulted the Argument That the State of Texas Consented to Suit in Federal Court.

By never raising the issue of waiver of sovereign immunity until after briefing of the case was completed in the court of appeals, Frew waived the issue. She never argued in the district court that the State had waived its sovereign immunity and never raised the issue in the court of appeals until after the close of briefing. It was not until October 2001 that Frew contended that the State somehow waived its sovereign immunity. *See* Appellees' FED. R. APP. P. 28(j) Letter 1 (Oct. 3, 2001) (asserting with one sentence that ¶303 of the consent decree represented

an express waiver of Eleventh Amendment immunity). And at no point in the courts below did Frew argue that the state officials' mere agreement to the consent decree waived the State's sovereign immunity, as she contends for the first time in this Court.

Frew had ample opportunity to advance properly a waiver argument in the courts below and failed to do so. As the Fifth Circuit explained, "[w]aiver of Eleventh Amendment immunity is certainly not a new concept." Pet. App. 39a n.95. Just as with other belated arguments, the courts of appeals have uniformly barred late invocations of alleged waivers of sovereign immunity like that of Frew, even under an "intervening-decision" exception. *See, e.g.*, *In re Hood*, 319 F.3d 755, 760 (CA6 2003), *pet. for cert. filed*, 71 U.S.L.W. 3724 (U.S. May 2, 2003) (No. 02-1606); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50-51 (CA1 2002); *Power v. Summers*, 226 F.3d 815, 819 (CA7 2000). This Court should confirm the propriety of these decisions and decline to reach the waiver issue.

Consistent application of the waiver rule to waiver-of-immunity claims enables courts to evaluate the issue with the benefit of argument and record development. Permitting plaintiffs who bring suits against States to hold in reserve contentions that a State has waived immunity from suit would be inconsistent with the courts of appeals' insistence that parties timely raise issues, as well as this Court's practice of declining to consider issues raised for the first time in this Court.[27] To indulge the belated suggestion of waiver invites gamesmanship with this issue and disserves the lower courts' ability to consider and adjudicate the issue. The Court should hold plaintiffs suing States to the same rules that govern the

27. *See, e.g.*, *Meyer v. Holley*, 123 S.Ct. 824, 832 (2003); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991).

presentation of all parties' arguments and decline to address Frew's waiver theory in this case.

B. Negotiating and Proposing the Consent Decree Was Not a Clear Waiver by the State of Texas of Its Eleventh Amendment Immunity.

1. A State's Eleventh Amendment immunity from suit is not relinquished except when done so expressly and unequivocally.

To accomplish an effective waiver of immunity from suit in federal court, a State must expressly agree to be sued in federal court or voluntarily invoke the jurisdiction of the federal court. *See Lapides*, 535 U.S., at 622; *Coll. Sav. Bank*, 527 U.S., at 675-76. Frew has not suggested that any express waiver occurred in this case. Instead, she contends that the state officials' agreement to the consent decree—to which the State was not a party—invoked the jurisdiction of the federal court on behalf of the State. *See, e.g.*, Pet'r Br., at 22. By asking the Court to infer the State's consent to suit from the negotiation and proposal of the consent decree by the defendant state officials, Frew in effect seeks a resurrection of the long-repudiated constructive-waiver doctrine. *Cf. Coll. Sav. Bank*, 527 U.S., at 667.

The Court has established the prerequisites for an effective waiver of sovereign immunity. It must be "unequivocal[ ]" and "express" so as to "leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The Court has also insisted that a State's intent to invoke the federal court's jurisdiction be voluntary, *see Coll. Sav. Bank*, 527 U.S., at 676-77, and possessed of "clarity," *Lapides*, 535 U.S., at 621. In short, the Court has imposed a "stringent" standard for waiver of immunity that requires a State to conclusively register its consent to suit in federal court. *Atascadero*, 473 U.S., at 241. "The whole point of requiring

a clear declaration by the State of its waiver is to be certain that the State in fact consents to suit." *Coll. Sav. Bank*, 527 U.S., at 680 (emphasis omitted).

2. A State does not voluntarily invoke the jurisdiction of a federal court when state officials settle an *Ex parte Young* suit in federal court.

a. Entry into a consent decree is not a voluntary invocation of federal court jurisdiction.

Frew asks the Court to treat the voluntary aspect of settlement agreements as manifesting not only a purpose of avoiding adjudication of a lawsuit, but also an intention to waive the Eleventh Amendment's limitations on federal-court jurisdiction over the States. The Court should decline Frew's invitation. Agreement to a consent decree is a distinct and separate decision from waiver of sovereign immunity. The "voluntary" quality of a consent decree relates only to a decision by the parties to give up their "right to litigate the issues involved in the case and thus save themselves the time, expense, and the inevitable risk of litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). That decision does not demonstrate the purposeful, clear, and unequivocal intent to achieve the very different result of waiving the State's Eleventh Amendment immunity. Indeed, the settlement agreement did not concede any liability, nor was it a submission of claims to the district court for an adjudication. *See* Lodging, ¶301 (explicitly disclaiming any admission of liability). Instead, it was an effort to end the litigation.

Far from affirmatively invoking the jurisdiction of the district court, the State asserted its immunity from suit under the Eleventh Amendment immunity early in the litigation, successfully obtaining dismissal of the named state-agency defendants. 3.R.818. The suggestion now—nine years after the State's dismissal from the suit—that the State consented to the lawsuit is fatally inconsistent

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IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, Carla Frew, *et al.*,

Petitioners,

v.

ALBERT HAWKINS, Commissioner of the Texas Health and Human Services Commission, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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30 pp

TABLE OF CONTENTS

Page

Table of Cited Authorities iv

I. SOVEREIGN IMMUNITY HAS BEEN WAIVED 1

A. THE STATE OFFICIALS' LITIGATION CONDUCT WAIVED SOVEREIGN IMMUNITY 1

1. *Lapides* Controls And *Ford* Does Not .. 2

2. *Gunter* Establishes That State Officials Sued As Officials May Waive Sovereign Immunity 4

3. Constructive Waiver Doctrine Does Not Apply To Litigation Conduct 5

B. THE OFFICIALS WAIVED IMMUNITY FROM DECREE ENFORCEMENT BY ASKING THE COURT TO ENTER A DECREE THAT CREATES "MANDATORY, ENFORCEABLE" OBLIGATIONS AND THAT ALLOWS THE PARTIES TO "REQUEST RELIEF" FROM THE COURT IF VIOLATIONS OCCUR 5

1. The Decree Waives Immunity Because It Subjects The State Officials To Future Court Proceedings If They Violate It .. 6

2. The Decree Does Not Imply That Immunity Exists 6

3. "Forum immunity" Does Not Limit Waiver Here 7

Contents

Page

C. IT IS FAIR TO ALLOW ENFORCEMENT OF A CONSENT DECREE THAT STATE OFFICIALS URGE SHOULD BE ENTERED, ESPECIALLY WHEN THE DECREE ITSELF PERMITS ENFORCEMENT IN THE EVENT OF FUTURE VIOLATIONS 8

1. The State Officials Had Fair Warning That Their Acts Would Waive Immunity 8

2. It Is Fair To Hold The Officials To The Terms Of Their Bargain 8

II. A FEDERAL COURT HAS AUTHORITY TO ENFORCE CONSENT DECREES ENTERED INTO BY STATE OFFICIALS IN *EX PARTE YOUNG* CASES 9

A. A DISTRICT COURT NEED NOT FIND A VIOLATION OF LAW TO ENFORCE A CONSENT DECREE, BUT THE DISTRICT COURT DID FIND FEDERAL LAW VIOLATIONS IN THIS CASE 9

1. The District Court Found Violations Of Federal Law; Pleadings, Motions And The Decree Sufficiently State Violations 9

2. A Liability Finding Is Not Required To Enter Or Enforce A Consent Decree Against State Officials 10

B. A FEDERAL DISTRICT COURT HAS JURISDICTION TO ENFORCE A CONSENT DECREE, WHICH IS A COURT ORDER, NOT A MERE CONTRACT 11

Contents

Page

1. The *Firefighters* Standards For Decree Entry Assure That Enforcement Is Also Proper 12

C. FEDERALISM DOES NOT PREVENT ENFORCEMENT OF THE DECREE 13

1. Exceptions To *Ex parte Young* Are Rare And Do Not Apply Here 13

a. District Courts May Enforce Decrees Despite An Impact On State Government Or Legislatures 14

b. District Courts May Enforce Decrees Against Successor Executive State Officials 16

c. *Jenkins* and *Dowell* Do Not Prevent Enforcement Because The State Officials Have Not Complied With The Decree 18

2. District Courts Do Not Have Boundless Authority When Enforcing Consent Decrees 18

3. The District Court's Ability To Modify Consent Decrees Provides A Practical Solution To The State Officials' Concerns 19

TABLE OF CITED AUTHORITIES

Page

Cases:

ACLU of Miss. v Finch, 638 F.2d 1336 (5th Cir. 1981) 16

Alden v Maine, 527 U.S. 706 (1999) 13

Antrican v Odom, 290 F.3d 178 (4th Cir.), *cert. denied*, 123 S.Ct. 467 (2002) 14

Arizonans for Official English v Arizona, 520 U.S. 43 (1997) 17

Baker v Carr, 369 U.S. 186 (1962) 14

Bd. of Educ. of Okla. City Pub. Sch. v Dowell, 498 U.S. 237 (1991) 18, 20

Clark v Barnard, 108 U.S. 436 (1883) 7

College Sav. v Fla. Prepaid Postsecondary, 527 U.S. 666 (1999) 5

Evans v City of Chicago, 10 F.3d 474 (7th Cir. 1993) (en banc), *cert. denied*, 511 U.S. 1082 (1994) 12, 16

Evans v Jeff D., 475 U.S. 717 (1986) 3

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Firefighters v Cleveland, 478 U.S. 501 (1986) 11, 12, 13

Cited Authorities

Page

Ford Motor Company v Department of Treasury, 323 U.S. 459 (1945) 3

Ganther v Ingle, 75 F.3d 207 (5th Cir. 1996) (per curiam) 16

Green v Mansour, 474 U.S. 64 (1985) 13

Gunter v Atlantic Coast Line R.R., 200 U.S. 273 (1906) 2, 4, 15

Hagood v Southern, 117 U.S. 52 (1886) 1, 5

Harris Trust and Savings Bank v Salomon Smith Barney, 530 U.S. 238 (2000) 2

Harris v Owens, 264 F.3d 1282 (10th Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002) 13

Hoptowitz v Spellman, 753 F.2d 779 (9th Cir. 1985) .. 16

Humphrey v Pegues, 83 U.S. 244 (16 Wall.) (1872) 4, 5, 15

Idaho v Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 14, 15

In re Harleston, 331 F.3d 699 (9th Cir. 2003). 15

J.B. ex rel. Hart v Valdez, 186 F.3d 1280 (10th Cir. 1999) 14

Jones v Montague, 194 U.S. 147 (1904) 7

Kentucky v Graham, 473 U.S. 159 (1985) 16

Cited Authorities

	Page
Kokkonen v Guardian Life Ins. Co., 511 U.S. 375 (1994)	10
Lapides v Board of Regents of the University System of Georgia, 535 U.S. 613 (2002).	2, 3, 4, 5, 7, 8
Lawyer v Department of Justice, 521 U.S. 567 (1997)	11
Lebron v Nat'l R.R. Pass. Corp., 513 U.S. 374 (1995)	2
Local No. 8-6, OCA Workers Int'l. Union v Missouri, 361 U.S. 363 (1960)	7
Maria Santiago v Corporacion de Renovacion, Etc., 554 F.2d 1210 (1st Cir. 1977)	17
Miller v French, 530 U.S. 327 (2000)	9
Milliken v Bradley, 433 U.S. 267 (1977)	11, 13, 15, 16, 18
Missouri v Jenkins, 515 U.S. 70 (1995)	18
Perry v Del Rio, 67 S.W.3d 85 (Tex. 2001)	3
Puerto Rico Aqueduct v Metcalf & Eddy, 506 U.S. 139 (1993)	6
Railway Employees v Wright, 364 U.S. 642 (1961)	11, 12, 13
Regents of Univ. of New Mexico v Knight, 321 F.3d 1111 (Fed. Cir. 2003)	7

Cited Authorities

	Page
Richardson v Fajardo Sugar Co., 241 U.S. 44 (1916)	5
Rufo v Inmates of Suffolk County Jail, 502 U.S. 367 (1992)	11, 16, 18, 19
Santobello v New York, 404 U.S. 257 (1971)	17
Taylor v Freeman, 34 F.3d 266 (4th Cir. 1994)	18
Torres v Toledo, 586 F.2d 858 (1st Cir. 1978)	16
United States v Armour & Co., 402 U.S. 673 (1971)	18
United States v Bd. of Educ. of City of Chicago, 799 F.2d 281 (7th Cir. 1986)	16, 18
United States v ITT Cont'l Baking Co., 420 U.S. 223 (1975)	18
United States v Peters, 9 U.S. 115 (5 Cranch) (1809)	15
Vance v Terrazas, 444 U.S. 252 (1980)	2
Verizon Md. v Pub. Serv. Comm'n., 535 U.S. 635 (2002)	10
Virginia Bankshares, Inc. v Sandberg, 501 U.S. 1083 (1991)	2
Walker v City of Birmingham, 388 U.S. 307 (1967)	11
Watson v Texas, 261 F.3d 436 (5th Cir. 2001)	6, 7
Wisconsin Dept. of Corrections v Schacht, 524 U.S. 381 (1998)	2

Page

Statutes and Constitutional Provisions:

U. S. CONST. amend. XI ..... *passim*

18 U.S.C. § 3626, *et seq.* 9

42 U.S.C. § 1396a(a)(43) 10

42 U.S.C. § 1396d(r) 1

42 U.S.C. § 1983 9

General Appropriations Act, H-B 1, Office of the Attorney General, Goal A.1 and Item 8, available at www.lbb.state.tx.us/Bill_78/6_Conf/78-6_Art01-a_0603.pdf. 2-3

Failed Bills:

H.R. 4304, § 2(c), 104th Cong. 2d Sess (1996) 9

S.2163, § 3, 105th Cong. 2d Sess. (1998) 9

S.248, § 3, 106th Cong. 1st Sess.(1999) 9

Miscellaneous:

THE FEDERALIST, Nos. 48, 78 (Benjamin Wright ed. 1961) 14

Federal Rule of Civil Procedure 7(a) 12

Federal Rule of Civil Procedure 7(b) 12

Federal Rule of Civil Procedure 8(a) 12

Page

Federal Rule of Civil Procedure 25(d) 16

Federal Rule of Civil Procedure 60(b) 19

Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19 (1987) 19

Michael W. McConnell, *Why Hold Elections?*, 1987 U. CHI. LEGAL F. 295 (1987) 11

After lengthy negotiations, the parties agreed to a consent decree. The Respondents ("State officials") asked the district court to enter the decree. It creates "mandatory, enforceable" obligations and allows the parties to "request relief" from future violations in the district court. L.; ¶¶302, 303.

The State officials did not argue that they were immune from decree enforcement until after they violated the order and faced efforts to enforce it.[1] It would be unfair and anomalous to allow them to: (1) seek entry of an order that preserves the district court's jurisdiction to relieve Petitioners ("children") from decree violations; and (2) later argue that the court lacks jurisdiction to enforce its own order, particularly in an *Ex parte Young* case to prevent ongoing violations of federal law.

I. SOVEREIGN IMMUNITY HAS BEEN WAIVED

A. The State Officials' Litigation Conduct Waived Sovereign Immunity. "When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done." *Hagood v Southern*, 117 U.S. 52, 68 (1886). Since the Eleventh

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1. Enforcement was required. *See* Pet. App. D. The State officials' report on a statewide sample of medical charts found that less than three percent of the children got even one check up that "met the essential criteria of an . . . EPSDT visit." Decree Enforcement Hearing Transcript Vol. IV at 657, lines 18-22. 42 U.S.C. § 1396d(r)(1)(B). Even immunization rates dropped in the two years before the motion to enforce the decree was filed. Plaintiffs' Exhibit OM-9 at 6. 42 U.S.C. § 1396d(r)(1)(B)(iii) (immunizations). More than one million children got no dental care at all. Pet. App. at 92a.

Things are getting worse. The State officials' reports show a steady decline in the ratio of children who get medical check ups. Defendants' Quarterly Report for January, 2002, Ex. W, Medical Statewideness Report at 7 (entered February 20, 2002). *See also id.* at 46 (methods). The decline is all the more troubling because the reported "participation ratios" are "inflated indicators of the [children's] actual participation rates." Pet. App. 90a and n.34.

The dental "participation ratio" and dental "exam utilization rate" did not improve from SFY1999 to SFY2000. Ex. W, *supra*, Dental Statewideness Report at 6.

Amendment has been waived in this case, the district court had jurisdiction to enforce the consent decree.[2]

1. *Lapides* Controls And *Ford* Does Not. This case is controlled by *Lapides v Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002). In *Lapides*, the State of Georgia voluntarily invoked the federal court's jurisdiction by removing a case, and thus waived all Eleventh Amendment objections to the exercise of jurisdiction over the State. *Id.* at 620.

As in *Lapides*, here the State officials' litigation conduct waived sovereign immunity even though State law does not authorize the Texas Attorney General to waive immunity. Response at 43-46. In *Lapides*, removal waived sovereign immunity because State law authorized the State's Attorney General to represent the State in court, even though State law prohibited the State's Attorney General from waiving sovereign immunity. 535 U.S. at 622-23.[3] In this regard, *Lapides*

2. The children's argument about waiver of immunity is properly presented. "The issue . . . is important, the parties have briefed it," and the Court should address it. *Vance v Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). The Court of Appeals ruled on the issue. *Virginia Bankshares, Inc. v Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *see* Pet. App. at 41a. Also, this Court should address the question, which is "'in a state of evolving definition and uncertainty and one of importance to the administration of federal law" *Id.* (citations omitted). *See, e.g., Wisconsin Dept. of Corrections v Schacht*, 524 U.S. 381, 397-98 (1998) (Kennedy, J., concurring). Moreover, the children urged their points promptly in supplemental briefs. The officials responded. *See Lebron v Nat'l R.R. Pass. Corp.*, 513 U.S. 374, 377-80 (1995). Finally, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust and Savings Bank v Salomon Smith Barney*, 530 U.S. 238, 245-46 n.2 (2000) (citation omitted); *Lebron*, 513 U.S. at 379-80. Response at 34.

3. Texas law authorizes the Attorney General to represent the State and its employees, to act before trial and to settle litigation. Children's Brief at 30 n.17, n.18. The Texas legislature has not "repudiate[d] the conduct of the . . . Attorney General" of this case. *See Gunter v Atlantic Coast Line R.R.*, 200 U.S. 273, 289 (1906). Indeed, in June, 2003, the legislature re-authorized the Texas Attorney General to represent the State and its employees, to act before trial and to settle cases. General Appropriations

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overrules *Ford Motor Company v Department of Treasury*, 323 U.S. 459 (1945). *Lapides*, 535 U.S. at 623. In *Ford*, a taxpayer filed suit in federal court against the State of Indiana. Since State law did not allow the officials to waive immunity, immunity was regained when it was raised for the first time in this Court. *Ford*, 323 U.S. at 468-70.

Lapides controls — and *Ford* does not — because "[i]n this case [the State officials] *voluntarily* invoked the federal court's jurisdiction" by asking the court to enter the consent decree. *See Lapides*, 535 U.S. at 620.[4] Their unanimous request — after so many months of negotiations and time to think about the proposed order — indicates that the State officials voluntarily invoked the district court's jurisdiction when they asked the court to enter the decree during the December, 1995 hearing.

Lapides overruled *Ford* for the important reason that rules "governing voluntary invocations of federal jurisdiction . . . [rest . . .] upon the problems of inconsistency and unfairness that a contrary rule of law would create." 535 U.S. at 622. In *Lapides*, it would have been unfair to let a State ask a district court to exercise jurisdiction over a case and then later urge

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Act, H-B 1, Office of the Attorney General, Goal A.1 and Item 8, available at www.lbb.state.tx.us/Bill_78/6_Conf/78-6_Art01-a_0603.pdf.

Perry v Del Rio, 67 S.W.3d 85 (Tex. 2001) further approves the Texas Attorney General's authority under State law. Response at 46. In *Perry*, the Attorney General proposed to settle a redistricting case, over the objection of the Speaker of the Texas House and others. Although the State district court may reject the Attorney General's proposal, the Attorney General has "authority to *propose* and *suggest* remedies," as occurred in this case. 67 S.W.3d at 93 (original emphasis). *Perry* does not control here because the district court adopted the decree urged by Texas' Attorney General.

Of course, in this case, the federal district court could have rejected the proposed decree. *Evans v Jeff D.*, 475 U.S. 717, 726-27 (1986). If so, the waiver of sovereign immunity from decree enforcement would have had no effect because no decree would have been entered.

4. In *Lapides*, Georgia voluntarily invoked the federal court's jurisdiction even though it was a defendant. The State officials' mere status as defendants does not defeat their voluntary invocation of federal court jurisdiction. Response at 37.

that the district court lacks jurisdiction over that same case. *Id* at 619. In this case, it would be unfair to let State officials ask a district court to exercise its jurisdiction to enter a consent decree and then urge that the district court lacks jurisdiction to enforce that order.

2. *Gunter* Establishes That State Officials Sued As Officials May Waive Sovereign Immunity. Ever since *Gunter v Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906) (*cited with approval in Lapides*, 535 U.S. at 623), it has been possible for State officials' litigation conduct to waive the State's sovereign immunity from suit. Response at 38.[5] In the earlier, related *Pegues* case, the "nominal defendants" were considered State officials. *Id.* at 285. Even though the "suit against state officers to enjoin them from . . . [violating] . . . the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment," *id.* at 283, the State officials had authority to waive the State's immunity. The relevant question was: "Did the State, through the authority which it had conferred upon the defendant officers, voluntarily submit to judicial determination the question raised in the *Pegues* case?" *Id.* at 284-85.

Here, as in *Gunter*, the answer is, "Yes." First, under State law, the county officials acted on behalf of the State. *Id.* at 285. In this case, the Texas Health and Human Services Commissioner and the Texas Commissioner of Health have authority under Texas law to administer the Medicaid program and EPSDT. Second, as in this case, the State's Attorney General was authorized to defend the suit. *Id.* at 286. *See* Children's Brief at 29-30; *supra*, n.3.

In the *Pegues* case the State submitted to the federal court's jurisdiction through the acts of its authorized treasurers and Attorney General. Since they waived sovereign immunity in

5. Throughout the first section of their Response, Respondents argue about "the State." Response at 9-32. They do not revert to being "State officials" until they argue that they cannot waive immunity. If they do not have authority to act on the State's behalf, how can the officials make arguments for "the State" throughout most of their Response?

the *Pegues* case, their successors were bound later in *Gunter*. 200 U.S. at 292.[6]

3. Constructive Waiver Doctrine Does Not Apply To Litigation Conduct. The doctrine of constructive waiver of immunity does not apply here because this case does not ask whether Congress could abrogate a State's immunity from suit. *See College Sav. v Fla. Prepaid Postsecondary*, 527 U.S. 666, 669 (1999). Response at 35. "*College Savings Bank* distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct. . . . The relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver." *Lapides* , 535 at 620. Here, the clear "act" occurred when the State officials asked the district court to enter the consent decree in December, 1995.[7]

B. The Officials Waived Immunity From Decree Enforcement By Asking The Court To Enter A Decree That Creates "Mandatory, Enforceable" Obligations And That Allows The Parties To "Request Relief" From The Court If Violations Occur. The decree clearly shows that the State officials waived immunity from efforts to enforce the order if they violate it. Response at 39; National Conference of State Legislatures, *et al. Amicus* Brief at 22-24 ("NCSL"). First, regardless of the decree's language, the State officials' actions at the December, 1995 hearing suffice to waive their immunity from enforcement efforts. *See above*.

6. In *Richardson v Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916), the Treasurer of Puerto Rico belatedly argued that sovereign immunity prevented suit against him. "[H]aving solemnly appeared . . . [the Treasurer] could not thereafter deny the court's jurisdiction."

In *Hagood v Southern*, State officials were sued in their official capacities. 117 U.S. at 67. Even so, the Court noted that if the State had submitted to the court's jurisdiction, it would have waived immunity and the State's officers could be "coerced" by federal court order. *Id.* at 68.

7. The officials' "intent" or motive is not relevant. Response at 36. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621.

1. The Decree Waives Immunity Because It Subjects The State Officials To Future Court Proceedings If They Violate It. Even if the State officials' actions alone did not waive immunity, the decree very clearly does. The decree "contemplates that Defendants' future activities will comport with the terms and intent of this Decree. If this proves to be incorrect, the parties may request relief from this Court." L.; ¶303.

It is beside the point that ¶303 does not "determine whether relief will be available." Response at 39; NCSL at 23. By agreeing that the children "may request relief," the State officials waived "the central benefits of . . . immunity – avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial. . . ." *Puerto Rico Aqueduct v Metcalf & Eddy*, 506 U.S. 139, 143-44 (1993).

Although clarification is not needed, the decree provides it. It creates "enforceable obligation[s]." L.; ¶302. "Ordinary usage suggests that 'enforcing' the Agreement might entail one party suing the other, which would be impossible unless . . . [the officials'] consent . . . embodied a waiver of . . . Eleventh Amendment immunity." *Watson v Texas*, 261 F.3d 436, 442 (5th Cir. 2001). Other than erasing "enforceable" from the decree, there is no way to urge that the district court cannot enforce the decree's "enforceable" obligations.

2. The Decree Does Not Imply That Immunity Exists. The State officials waived sovereign immunity even though the children did not "concede the validity of Defendants' defenses. . . ." L.; ¶301. That quote, from the second sentence of ¶301, says nothing about the State officials. It only mentions the children. When the decree discusses the State officials, it discusses them specifically. *See*, third sentence of ¶301. ("*Defendants* do not concede liability.") (emphasis added). When the decree discusses both parties, the decree is so phrased; the first sentence of ¶301 discusses "the parties," not the "Plaintiffs" or the "Defendants."

Further, reading the first and second sentences of ¶301 together clarifies their meaning. The children did not concede

the validity of the Defendants' defenses to liability. Immunity is not the same as liability. *See* Children's Brief at 29.

A reader would have to take ¶301 out of context to be confused about whether the district court maintained authority to resolve disputes about decree compliance. When ¶301 says that the parties intended to "resolve many of the issues in this litigation amicably . . . without the need for the Court's intervention," it means that since the parties had agreed to a decree, the district court would not need to take evidence on the merits, decide whether the State officials were liable or craft its own equitable order. Nonetheless, the parties could still "request relief" from decree violations. ¶303.[8]

3. "Forum Immunity" Does Not Limit Waiver Here. In *Lapides*, the United States argued that removal only waives choice of forum, so other forms of immunity might still apply. Response at 42 n.31. Sovereign immunity is a "personal privilege which [the State] may waive at pleasure," *Clark v Barnard*, 108 U.S. 436, 447 (1883), so the scope of waiver may vary from case to case, depending on the acts that effect the waiver. *See Regents of Univ. of New Mexico v Knight*, 321 F.3d 1111, 1125-26 (Fed. Cir. 2003); *Watson*, 261 F.3d at 443.

Here, by asking the district court to enter an agreed order, the State officials waived immunity only from further actions to enforce the decree. Certainly, by asking the district court to enter a consent decree, the State officials waived their immunity objections to enforcing it. This is the nature of an order; it can be enforced. *Jones v Montague*, 194 U.S. 147, 152 (1904) ("a judgment which can be carried into effect"); *see also Watson*, 261 F.3d at 442.[9]

Waiver is clear in this case because of the decree's language. The decree specifically: (1) creates "mandatory,

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8. If the State officials had wanted to "end the litigation" when the decree was entered in 1996, they would not have urged the district court to enter a decree that allows the parties to "request relief" from the district court for future decree violations. ¶303. Response at 36.

9. A federal court cannot enter an advisory order that has no effect, or that cannot be enforced. *Local No. 8-6, OCA Workers Int'l. Union v Missouri*, 361 U.S. 363, 367 (1960).

enforceable obligation[s]" L.; ¶302 (emphasis added); and (2) allows the parties to "request relief" from the district court if disputes arise about decree compliance. ¶303.

C. It Is Fair To Allow Enforcement Of A Consent Decree That State Officials Urge Should Be Entered, Especially When The Decree Itself Permits Enforcement In The Event Of Future Violations. It would be unfair and anomalous if the district court could not enforce a decree that State officials ask the court to enter, particularly when the decree itself specifically envisions "mandatory, enforceable" obligations and allows the parties to "request relief" from future violations.

1. The State Officials Had Fair Warning That Their Acts Would Waive Immunity. Surely the State officials were on notice that the decree could be enforced; they helped to draft an order that creates "mandatory, enforceable obligation[s]," and that allows the parties to "request relief" from violations. L.; ¶¶302, 303. Response at 38. Further, *Lapides* itself held that Georgia waived its immunity by removing a case, even though presumably Georgia did not expect that result.

2. It Is Fair To Hold The Officials To The Terms Of Their Bargain. In exchange for the decree, the State officials "bought peace" with a class of "present and future" indigent Texas children who qualify for Medicaid. Order (filed July 18, 1994). The class includes about 1.5 million children, who are all precluded from initiating new suits concerning the matters resolved by the decree.

The decree was entered more than seven years ago, in early 1996. The children expected the decree to relieve them from the State officials' ongoing violation of Congress' promise of comprehensive health care, including preventive care.

If the children had known that the State officials would seek to disable the decree as soon as they violated it, the children would not have agreed to the decree. They would have pursued trial. In the intervening seven years, trial would have occurred and an injunction would have issued to protect the children and their access to health care.

II. A FEDERAL COURT HAS AUTHORITY TO ENFORCE CONSENT DECREES ENTERED INTO BY STATE OFFICIALS IN *EX PARTE YOUNG* CASES

A. A District Court Need Not Find A Violation Of Law To Enforce A Consent Decree, But The District Court Did Find Federal Law Violations In This Case. The State officials argued below that "[b]efore the Court evaluates . . . compliance with the consent decree, it must determine what, if any, rights created by the decree are enforceable in federal court." Appellants' Brief at 9 (No. 00-41112, filed February 22, 2001). This argument succeeded. The Court of Appeals held: "[b]efore the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right." Pet. App. at 27a-28a.[10]

Despite their success below, the State officials now backtrack from their "rights" analysis of immunity and consent decree enforcement. They argue that the point of comparison is federal law, not federal rights protected by 42 U.S.C. § 1983. They now urge that a motion to enforce a consent decree against State officials must allege ongoing violations of federal law. Response at 12.

1. The District Court Found Violations Of Federal Law; Pleadings, Motions And The Decree Also Sufficiently State Violations. First, the officials' argument fails because the district court found ongoing violations of the federal Medicaid Act before it issued its enforcement order. "The court . . . has

10. The Utah *amici* argue that the decree should not be enforced because a violation of the decree is not necessarily a violation of a federal right. Utah Brief at 1; *see also* Response at 3, 5-6, 14-15 n.10. While Congress has limited consent decree enforcement in this manner in prison litigation, 18 U.S.C. § 3626, *et seq.*, it has not done so in cases like this one.

Absent Congress' "'clearest command,'" this Court should not displace the district court's age-old equitable discretion to enforce the decree in this case. *See Miller v French*, 530 U.S. 327, 340 (2000) (*citation omitted*). Congressional efforts along these lines have failed. S.248, § 3, 106th Cong. 1st Sess. (1999) (consent decrees involving State or local officials); S.2163, § 3, 105th Cong. 2d Sess. (1998) (consent decrees involving State or local officials); H.R. 4304, § 2(c), 104th Cong. 2d Sess (1996) (school desegregation consent decrees).

found defendants in violation . . . for failing to meet the requirements of 42 U.S.C. § 1396a(a)(43) based on the overwhelming evidence cited in Part One" of its memorandum opinion. Pet. App. at 272a-73a.

Second, the State officials' legal theory is wrong. The Eleventh Amendment does not bar this suit because the "*complaint alleges* an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. v Pub. Serv. Comm'n.*, 535 U.S. 635, 645 (2002) (emphasis added). This is a classic *Ex Parte Young* case because the complaint alleges serious ongoing violations of the federal Medicaid Act and the children seek only prospective relief.

Federal law is relied on throughout the proceedings, not just in the complaint. The decree was "reached within the framework of federal law related to the EPSDT and Medicaid programs." L.; ¶308. The motion to enforce states "that the Defendants have violated the decree *and relevant law*. . . ." Plaintiffs' Prehearing Motion to Enforce Consent Decree at 48 (filed March 8, 2000) (emphasis added). Finally, as the Court of Appeals recognized, when the district court found that the State officials had violated the decree, the court often referred "to statutory requirements and the consistency of the consent decree with the Medicaid Act." Pet. App. at 13a. *See also* Pet. App. at 244a, 264a-66a, 267a-69a, 272a-74a.[11]

2. A Liability Finding Is Not Required To Enter Or Enforce A Consent Decree Against State Officials. Even though legislative redistricting is at the heart of sovereignty and our representative government, settlement may be entered without

11. There is no need for a separate "basis for jurisdiction" for the district court's enforcement order in this case. Response at 12, *citing Kokkonen v Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994). First, unlike this case, *Kokkonen* addresses enforcement *after* a case was dismissed. 511 U.S. at 377. Second, *Kokkonen* required a separate basis for jurisdiction because the dismissal order did not include the settlement terms or retain jurisdiction over the settlement. 511 U.S. at 381. In this case, the consent decree both includes the terms of the agreement within its four corners and retains jurisdiction to resolve disputes about decree compliance. L.; ¶ 303. A "breach of the agreement [is] a violation of the order, and ancillary jurisdiction to enforce the agreement . . . therefore exist[s]." 511 U.S. at 381.

a liability finding. *Lawyer v Department of Justice*, 521 U.S. 567, 578-79 n.6 (1997), *citing Firefighters v Cleveland*, 478 U.S. 501, 522 (1986).

The State officials do not cite any decisions that hold that a district court must find a violation of federal law – or that a motion must allege a violation of federal law – to enforce a consent decree. This is because there is no "rule 'insisting on a public *mea culpa*.'" *Lawyer*, 521 U.S. at 574. This is particularly true when the district court finds a substantial likelihood that the plaintiffs would succeed at trial before entering the decree, Order Concerning Fairness of Consent Decree at 25 (filed January 25, 1996) ("Fairness Order"), and then finds that the State officials have violated the law before ordering enforcement. Pet. App. at 272a-73a.

Once a consent decree is entered, it is entitled to the same respect as any other federal court order. *Rufo v Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). It is treated according to the same rules as any other federal court order. *Id.*

B. A Federal District Court Has Jurisdiction to Enforce A Consent Decree, Which Is A Court Order, Not A Mere Contract. A consent decree "is an agreement that the parties desire and expect will be reflected in, and be *enforceable as, a judicial decree*. . . ." *Rufo*, 502 U.S. at 378 (emphasis added); *see also Railway Employees v Wright*, 364 U.S. 642, 650-51 (1961). Even federal equitable orders that are "subject to substantial constitutional question" must be obeyed unless modified or dissolved. *Walker v City of Birmingham*, 388 U.S. 307, 317-19, 321 (1967). Unless it is held unlawful, "the consent decree stands as a binding court judgment." Michael W. McConnell, *Why Hold Elections?*, 1987 U. Chi. Legal F. 295, 305 (1987).

For good reason, a consent decree is just as enforceable as a fully disputed order. Response at 17-18; Utah at 19. A consent decree incorporates State officials' "prerogatives . . . since of course [they] proposed . . . [the decree] . . . in the first place." *Milliken v Bradley*, 433 U.S. 267, 281 (1977).

1. The *Firefighters* Standards For Decree Entry Assure That Enforcement Is Also Proper. The children urge that if a consent decree can be entered, it can be enforced. Children's Brief at 42-43. The test to determine if a decree should be entered – or enforced – is consistent with *Ex parte Young* because it requires (1) the district court to have jurisdiction over the dispute and (2) the decree to relate to federal law. *Firefighters*, 478 U.S. at 525.

To be properly entered a consent decree must "'spring from and serve to resolve a dispute within the court's subject-matter jurisdiction'; . . . and must 'further the objectives of the law upon which the complaint was based.'" *Id.* at 525 (citation omitted). The first *Firefighters* factor ensures that the district court has jurisdiction to enter the decree, in this case federal question jurisdiction.[12] The third *Firefighters* factor ensures that the proposed remedial decree sufficiently relates to the federal law that underlies the suit. *See also Wright*, 364 U.S. at 651 (modify decree if it is "in conflict with *statutory objectives*") (emphasis added).

The *Firefighters'* test protects the Eleventh Amendment's values by requiring remedial decrees to "further the objectives of the law." When a court enters disputed injunctive relief, the order must "address and relate to" a violation of federal law and be "tailored to cure" the condition that violates federal

12. The State officials rely on *Evans v City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), *cert. denied*, 511 U.S. 1082 (1984) to urge that separation of powers concerns counsel against enforcement of the consent decree in this case. Response at 23-24. In *Evans*, the plaintiffs claimed no violation of federal law. *Id.* at 482-83. The consent decree could not be enforced because "entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law." *Id.* at 480 (plurality per Easterbrook, J.)

Evans contradicts the State officials' argument that a motion to enforce a decree must assert ongoing violations of law. A "claim" of a violation of federal law is sufficient to support both entry and enforcement of a decree. *Id.* at 480. A "claim" in made in a pleading, such as a complaint. Fed. R. Civ. P. 7(a) (complaint is a pleading); Fed. R. Civ. P. 8(a) (claims in pleadings). A motion is not a pleading. *See* Fed. R. Civ. P. 7(b). *Evans* requires a "claim" of a violation of law, and "claims" are made in pleadings, not motions.

law. *Milliken*, 433 U.S. at 282. Stated differently, the remedy must "further the objectives of the law" at issue in the case. *Firefighters*, 478 U.S. at 525.[13]

The *Firefighters* test fits with the concept that the district court's authority to enter a consent decree stems from the federal statute at issue in the case. Response at 18, *citing Wright*, 364 U.S. at 651. By requiring the decree to "further the objectives of the law," *Firefighters* ensures the requisite tie between the decree and the underlying statute.

C. Federalism Does Not Prevent Enforcement Of The Decree. Consonant with federalism and our government's structure, federal courts may enforce consent decrees against State officials. Admittedly, *Alden v Maine*, 527 U.S. 706, 751 (1999) mentions federalism and the integrity of the branches of State government in its discussion of whether to require State courts to adjudicate damages claims against States. Response at 23. But, *Ex Parte Young* is not inimical to the integrity of State government and its branches; *Alden* itself emphasizes that *Ex parte Young* remains a vital aspect of our nation's law. 527 U.S. at 757. *Ex Parte Young* is critical to our constitutional scheme because it implements the Supremacy clause. *Green v Mansour*, 474 U.S. 64, 68 (1985).

1. Exceptions to *Ex parte Young* Are Rare And Do Not Apply Here. Exceptions to *Ex parte Young* should be few and far between because *Ex parte Young* is an essential aspect of our government's structure. *Harris v Owens*, 264 F.3d 1282, 1293 (10th Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002) (No unique sovereignty interest in Medicaid). Nonetheless, the Eleventh Amendment prohibits rare suits for prospective relief from State officials. For example, despite *Ex parte Young*, prospective relief is not available when disputes "uniquely implicate

13. The State officials incorrectly argue that since after trial plaintiffs could only get an "injunction against ongoing violations of federal law, . . . it would be a perverse incentive indeed to offer greater relief from settlement than from full victory on the merits." Response at 31; NCSL at 28. An invalid assumption underlies the State officials' argument. An injunction entered after a trial on the merits need not be limited strictly to the terms of the federal law at issue. *Milliken*, 433 U.S. at 281-82; *see also* Children's Brief at 38-40.

sovereign interests," such as submerged lands related to navigation. *Idaho v Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

Despite the "unique sovereignty" exception, this Court has "never doubted the importance of state interests in cases falling squarely within our past interpretations of the *Young* doctrine." *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring). Even though Medicaid is very important, it does not involve essential aspects of sovereignty. A "state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*." *J.B. ex rel. Hart v Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) (Medicaid, including EPSDT, and other statutes). Even though a State

> may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, . . . it face[s] the risk of being ordered by a federal court to correct the problems in its system. If the State did not want to face this federal involvement, it was free to decline federal [Medicaid] funds.

Antrican v Odom, 290 F.3d 178, 190 (4th Cir.), *cert. denied*, 123 S. Ct. 467 (2002) (EPSDT dental).[14]

a. District Courts May Enforce Decrees Despite An Impact On State Government Or Legislatures. Since the nation's inception, courts have been "an intermediate body between the people and the legislature, . . . to keep the latter within the limits assigned to their authority." THE FEDERALIST, No. 78 at 492 (Benjamin Wright ed. 1961); *see also id.*, No. 48. Federal courts may resolve cases much more directly "political" than this one, even if they "touch matters of state governmental organization." *Baker v Carr*, 369 U.S. 186, 229 (1962). Response at 22-29.

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14. Since administration of a Medicaid program does not create a unique sovereign interest worthy of Eleventh Amendment protection, it also does not involve a "residual and inviolable" interest that requires immunity protection. Response at 49-50.

Despite the respect due them, State legislatures do not have authority to "undo" valid federal court orders. As Chief Justice Marshall explained in a suit against a State Treasurer,

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all. . . . [and] . . . the citizens of every . . . state . . .must feel a deep interest in resisting principles so destructive of the union. . . .

United States v Peters, 9 U.S. 115, 136 (5 Cranch) (1809). Even when State officials are sued, it is important for federal courts to have authority to interpret federal law. *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J. concurring).

Subsequent State legislation cannot interfere with enforcement of prospective relief that is ancillary to an order where the district court had jurisdiction. In *Humphrey v Pegues*, 83 U.S. 244, 249 (16 Wall.) (1872), a federal court enjoined South Carolina officials from taxing a railroad. The officials did not raise sovereign immunity. *Gunter*, 200 U.S. at 292. Years later, the State legislature required taxation of the same railroad. Despite the new legislation, the earlier federal court order was enforceable. "[T]he proposition that the Eleventh Amendment . . . control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion." *Id.* at 292, *see also In re Harleston*, 331 F.3d 699, 703 (9th Cir. 2003).

Even in matters of State legislative budgeting, federalism concerns do not prohibit *Ex parte Young* suits. Response at 24, 46-47. In *Milliken*, 433 U.S. 267, the district court ordered State officials to share in the future cost of education programs in Detroit. "[P]rinciples of federalism [are not] abrogated by the

decree. The District Court has . . . [not] . . . attempted to . . . mandate a particular method or structure of state . . . financing." *Id.* at 291.[15]

b. District Courts May Enforce Decrees Against Successor Executive State Officials. The very nature of *Ex parte Young* litigation is that the suit runs against the *office*, not the individual who sits in that office for the time being.[16] Response at 23-24. *Ex parte Young* itself emphasizes that Mr. Young "was complained of as an officer." 209 U.S. 123, 159 (1908).

Second, "[i]n an official-capacity action in federal court, death or replacement of the named official will result in the automatic substitution of the official's successor in office." *Kentucky v Graham*, 473 U.S. 159, 166 n.11 (1985); *citing* Fed. R. Civ. P. 25(d). In *Ex parte Young* cases, prospective orders bind successors in office. *See, e.g., Ganther v Ingle*, 75 F.3d 207, 210 (5th Cir. 1996) (per curiam); *Hoptowitz v Spellman*, 753 F.2d 779, 781 (9th Cir. 1985); *ACLU of Miss. v Finch*, 638 F.2d 1336, 1341-42 (5th Cir. 1981); *Torres v Toledo*, 586 F.2d 858, 859-60 (1st Cir. 1978).[17]

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15. In *United States v Bd. of Educ. of City of Chicago*, 799 F.2d 281, 284 (7th Cir. 1986), both parties urged entry of a decree that required them to in good faith seek desegregation funding. During the course of the suit, the national administration changed. *See Evans*, 10 F.3d at 479. Nonetheless, the United States was held to the terms of the decree, despite its sovereign discretion concerning funding. 799 F.2d at 294-95.

16. The Utah *amici* rely on decisions about the contracts clause of the United States Constitution, not the Eleventh Amendment, to argue that decrees should not bind successors in office. Utah Brief at 18-19. Further, the decisions address contracts, not valid federal court orders, as in this case. *See, e.g., Rufo*, 502 U.S. at 378 (consent decree is "a judicial decree").

17. These cases rely on Fed. R. Civ. P. 25(d) and *Ex parte Young* to hold that equitable relief runs to successor State officials. This Court modified Rule 25(d) to require orderly succession of public officials sued in their official capacities, including State officials. Advisory Committee Notes to 1961 Amendment. This Court would not have applied the Rule to State officials in violation of the Eleventh Amendment's limits on federal court jurisdiction, especially when the Court clearly considered *Ex Parte Young* and the Amendment at the time. *Id.*

The same is true with consent decrees.[18] When plaintiffs and State officials "stipulate to a disposition" of a suit, the equitable order is binding "even though the particular officers named in the order may at some time be replaced by others. . . . [A]ny other result would undermine the strong policy in favor of enforcing federal law, a policy that originally impelled the courts to create the fictional distinction between officer and government." *Maria Santiago v Corporacion de Renovacion, Etc.*, 554 F.2d 1210, 1211, 1213 (1st Cir. 1977).[19]

Further, imagine the practical problems if consent decrees cannot extend past the term of the officials who agree to them. More complex cases will go to trial because plaintiffs will not agree to a short-lived decree that cannot be expected to resolve complicated problems. Second, plaintiffs may be forced to file new litigation if a short-lived decree expires before the dispute is resolved. This will simply result in more litigation, possibly before a new district judge who will not have the benefit of the district judge's experience in the first case. Finally, how long will the decree continue if – as in this case – there are several defendant-State officials whose terms end at different times?

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18. State officials even bind their successors when they settle criminal cases, despite the sovereign's strong interest there. *Santobello v New York*, 404 U.S. 257 (1971). Settlement of criminal cases is favored, but it "presuppose[s] fairness in securing agreement." *Id.* at 260-261.

19. "Friendly adversaries" did not subvert our "republican form of government" by agreeing to the consent decree. Response at 25. This argument brings forth the specter of collusion. *See, e.g., Arizonans for Official English v Arizona*, 520 U.S. 43, 71 (1997). Collusion was absent from the negotiations. Fairness Order at 22. This case was disputed until negotiations began, roughly a year after the case was filed. *Id.* at 23-24 ("extensive discovery"). The State officials' motion to dismiss was denied, *id.* at 23, so the law of the case was that plaintiffs had valid legal claims. *Id.* at 25 ("likelihood that Plaintiffs could have succeeded at trial").

Also, extensive notice allowed third parties to comment on the proposed decree. Fairness Order at 34 n.12 ("people who wanted to review the decree could do so;" "class members *and others* could call for more information") (emphasis added). The district court considered comments filed by third parties before entering the decree. *Id.* at 34.

c. *Jenkins* and *Dowell* Do Not Prevent Enforcement Because The State Officials Have Not Complied With The Decree. The district court was correct to enforce the decree despite federalism concerns raised in concurring opinions in *Missouri v Jenkins*, 515 U.S. 70 (1995) and *Bd. of Educ. of Okla. City Pub. Sch. v Dowell*, 498 U.S. 237 (1991). Response at 19, 23, 28-29. A district court should not dissolve a decree unless officials "have operated in compliance with it for a reasonable period of time." *Dowell*, 498 U.S. at 247; *Jenkins*, 515 U.S. at 89 . Here, the officials have not complied with the decree for a reasonable time. To the contrary, they are violating it.

2. District Courts Do Not Have Boundless Authority When Enforcing Consent Decrees. "Objective limitations" guide district courts when they enforce consent decrees. Response at 17; NCSL at 19-21. The district court must enforce the decree as written, using the rules normally used to interpret contracts. *United States v ITT Cont'l Baking Co.*, 420 U.S. 223, 236-38 (1975); *United States v Armour & Co.*, 402 U.S. 673, 682 (1971).[20] A district court's decision about whether a consent decree has been violated is limited by the terms of the decree itself – which state the parties' decisions about policy issues presented by the case. The court's further enforcement orders are limited by this Court's decisions about equitable relief in *Ex parte Young* cases against State officials. *Missouri v Jenkins*, 515 U.S. 70; *Rufo*, 502 U.S. 367; *Milliken*, 433 U.S. 267.

Here, the district court's actions belie the State officials' unfounded fear of the court's "limitless authority" to enforce the decree that they have violated. The district court did not fashion a remedial order. It ordered the State officials to propose their own plans to remedy the decree violations detailed in the district court's opinion. Pet. App. 276a-278a. This admirable restraint appropriately accommodates sovereignty concerns. *Milliken*, 433 U.S. at 281; *Taylor v Freeman*, 34 F.3d 266, 274 (4th Cir. 1994) (Luttig, J.); *Bd. of Educ. of City of Chicago*, 799 F.2d at 289-90.

20. Appellate review is available to ensure that the district court's interpretation is proper. *See Armour*, 402 U.S. at 682-83. The officials urged below that the district court's interpretation was in error. Appellants' Brief at 15-60 (No. 00-41112, filed February 22, 2001).

3. The District Court's Ability To Modify Consent Decrees Provides A Practical Solution To The State Officials' Concerns. For the first time in this appeal, the State officials raise their concerns about federalism and their ability to bind successors. They also allege a host of potential problems concerning "budgeting, staffing, data collection, recruitment, administrative oversight, and monitoring." Response at 27-28; *see also* Utah at 13, 15-17.

If the decree had intolerably intruded into State affairs, the officials could have moved to modify it. Fed. R. Civ. P. 60(b). Modification is a "safety valve" to accommodate new circumstances. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 34 (1987). A district court should have the first opportunity to decide if its decree has become inequitable or unworkable because of significant changes in law or facts, so that modification is justified. *See, Rufo*, 502 U.S. at 383-84.

Agreed modifications have already avoided the very type of problem the State officials fear. When the decree was entered in 1996, it required discussions about EPSDT with almost all Medicaid applicants who qualified for EPSDT. L.; ¶19, *et seq.* In 2000, successor officials hoped to revise the eligibility process by eliminating many in-person interviews. The Texas legislature was also considering the issue. Joint Motion to Modify ¶19 of Consent Decree at 1-2 (filed October 18, 2000). Given these changes, the district court granted the parties' motion to clarify that the decree does not prevent "the Texas Medicaid Program or the Texas legislature from simplifying Texas' Medicaid eligibility system for children and teens." *Id.* at 4; Order (filed December 14, 2000).[21]

21. The district court granted another joint motion to modify the decree after the State officials revised their medical check up schedule. L.; ¶35. Order (filed February 28, 2000); *see also* Pet. App. 86a n.30; First Joint Motion to Modify Paragraph 35 of the Consent Decree: Schedule for Medical Check Ups (filed January 31, 2000).

Finally, the State officials should not fear that the consent decree will permanently displace their administration of Medicaid and EPSDT. Response at 19 n.14; NCSL at 13. To be relieved of the decree in its entirety, they just have to comply for a reasonable length of time or, in other words, do what they asked to be ordered to do. *See Dowell*, 498 U.S. at 247.

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No. 02-628

In the Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, ET AL., PETITIONERS

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a State that voluntarily seeks entry of a consent decree in federal court waives its Eleventh Amendment immunity from actions to enforce the decree.

2. Whether the Eleventh Amendment bars a federal district court from enforcing a consent decree that contains prospective relief against state officials based on alleged violations of federal law where a violation of the decree does not also constitute an independent violation of federal law that is remediable under 42 U.S.C. 1983.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
Judicial enforcement of the consent decree in this case does not violate the Eleventh Amendment	9
I. A State that voluntarily seeks entry of a consent decree in federal court waives its immunity from actions to enforce that decree	10
A. A State waives its immunity when it voluntarily submits its rights for judicial determination	10
B. A State that consents to entry of a judicial decree voluntarily submits its rights for judicial determination and waives immunity from actions to enforce the decree	13
C. The considerations that underlie the voluntary submission doctrine apply with particular force here	17
D. The court of appeals' analysis is unpersuasive	19
II. The Eleventh Amendment does not bar enforcement of a consent decree that provides prospective relief against state officials based on alleged violations of federal law	21
Conclusion	24

TABLE OF AUTHORITIES

Cases:	
Clark v. *Barnard*, 108 U.S. 436 (1883)	9, 10, 11

Cases—Continued: Page

Ford Motor Co. v. *Department of Treasury of Ind.*, 323 U.S. 459 (1945) 13
Gardner v. *New Jersey*, 329 U.S. 565 (1947) 10
Gunter v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906) 7, 10, 11, 15, 23
Hans v. *Louisiana*, 134 U.S. 1 (1890) 9
Harris v. *McRae*, 448 U.S. 297 (1980) 2
Humphrey v. *Pegues*, 83 U.S. (16 Wall.) 244 (1872) 11
Hutto v. *Finney*, 437 U.S. 678 (1978) 22, 23
Kokkonen v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994) 15, 16, 18, 22
Kozlowski v. *Coughlin*, 871 F.2d 241 (2d Cir. 1989) 17, 23
Lapides v. *Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) ..... *passim*
Lawyer v. *Department of Justice*, 521 U.S. 567 (1997) 20
Local No. 93, Int'l Assoc. of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986) 4, 14, 16, 23
Mitchell v. *Commission on Adult Entm't Establishments*, 12 F.3d 406 (3d Cir. 1993) 18
New Hampshire v. *Maine*, 532 U.S. 742 (2001) 17
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) 9, 14, 15, 18, 19, 23
Spallone v. *United States*, 493 U.S. 265 (1990) 16, 23
United States v. *Armour & Co.*, 402 U.S. 673 (1971) 17
United States v. *Swift & Co.*, 286 U.S. 106 (1932) 14
Vecchione v. *Wohlgemuth*, 558 F.2d 150 (3d Cir.), cert. denied, 434 U.S. 943 (1977) 23
Verizon Md. Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) 21
Wisconsin Hospital Ass'n v. *Reivitz*, 820 F.2d 863 (7th Cir. 1987) 23

Cases–Continued: Page

Young, Ex parte, 209 U.S. 123 (1908) 4, 8, 21
Young v. *Unied States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 18

Constitution, statutes and rules:

U.S. Const.:
Art. III 8, 17, 18
Amend. XI ..... *passim*
42 U.S.C. 1396 *et seq.* 2
42 U.S.C. 1396a(a)(43) 1, 2
42 U.S.C. 1396b(a)(1) 2
42 U.S.C. 1396d(b) 2
42 U.S.C. 1396d(r) 1, 2
42 U.S.C. 1983 ..... 3, 4, 8, 22
Fed. R. Civ. P.:
Rule 23(e) 3
Rule 60(b)(5) 18

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INTEREST OF THE UNITED STATES

The questions presented in this case concern whether the Eleventh Amendment bars enforcement of a consent decree that is designed to ensure that state officials comply with the requirements of Medicaid's Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, 42 U.S.C. 1396a(a)(43), 1396d(r). The United States has a significant interest in the resolution of that issue. The Secretary of Health and Human Services administers the Medicaid program, and the United States funds at least 50% of a State's Medicaid costs. The United States has an interest in ensuring that the duties that States volun-

tarily assume under the EPSDT program are enforced in a manner that protects the beneficiaries of the program, but avoids interference with federal oversight and a State's legitimate discretion. The question whether the Eleventh Amendment bars enforcement of a consent decree that is designed to ensure compliance with the requirements under the EPSDT program implicates those federal interests.

STATEMENT

1. The Medicaid program is a cooperative federal-state public assistance program that provides federal financial assistance to States that elect to pay for the medical services of certain needy individuals. See 42 U.S.C. 1396 *et seq.*; *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). Federal funding is calculated according to a statutory formula that pays, at a minimum, 50% of the State's costs. 42 U.S.C. 1396b(a)(1), 1396d(b). State participation in the Medicaid program is optional, but once a State elects to participate, it must comply with the requirements of the Medicaid statute. See *Harris*, 448 U.S. at 301. The State of Texas participates in the Medicaid program.

The Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, 42 U.S.C. 1396a(a)(43), 1396d(r), is a component of the Medicaid program. Under the EPSDT program, a State's Medicaid plan must provide for (1) informing eligible Medicaid recipients under the age of 21 of the availability of screening, diagnostic, and treatment services, (2) arranging screening services where they are requested, and (3) arranging necessary corrective treatment. 42 U.S.C. 1396a(a)(43).

2. In 1993, several mothers of children eligible for EPSDT services in Texas (petitioners), filed suit in federal district court against Texas state officials responsible for administering the EPSDT program (respondents). Petitioners alleged that Texas was violating its obligations under the EPSDT program, and they sought prospective relief under 42 U.S.C. 1983. Pet. App. 54a-56a.[1]

The district court certified a class consisting of children in Texas entitled to EPSDT services. Pet. App. 54a. Respondents moved to dismiss, on the ground that EPSDT's provisions do not create rights that are enforceable under Section 1983. *Id.* at 233a-234a. The district court denied the motion. *Id.* at 234a. After two years of negotiation, the parties proposed a consent decree to the court. *Id.* at 57a. Pursuant to Federal Rule of Civil Procedure 23(e), the district court held a hearing to determine whether to enter the proposed decree. During the hearing, the parties urged the court to approve the decree. Pet. App. 57a. In 1996, the district court approved the decree as fair, reasonable, and adequate. *Ibid.*

The decree recites that "[t]he parties agree and the Court orders Defendants to implement the * * * changes and procedures for the Texas EPSDT program" set forth in the decree. Consent Decree para. 6. The decree also specifies that it creates "mandatory, enforceable obligation[s]." *Id.* at para. 302. The decree authorizes petitioners to "request relief from the Court" if respondents' future activities do not "comport with the terms and intent of [the] Decree." *Id.* at para. 303. The decree explains that "the agreements negotiated by the parties which led to this Order were

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[1] Petitioners also named state agencies as defendants, but the district court dismissed them from the case. Pet. App. 234a.

reached within the framework of federal law related to the EPSDT and Medicaid programs." *Id.* at para. 308.

3. In 1998, petitioners filed a motion alleging that respondents had failed to comply with certain provisions of the decree. Petitioners sought enforcement of those provisions. Pet. App. 58a-59a. Respondents argued that they had complied with the decree. *Id.* at 58a. In the alternative, they argued that the Eleventh Amendment bars enforcement of the decree unless a violation of the decree constitutes an independent violation of federal law that is remediable under 42 U.S.C. 1983. Pet. App. 58a. After an evidentiary hearing, the district court found that respondents had violated various provisions of the decree. *Id.* at 59a-232a. The court ordered respondents to propose corrective action to remedy those violations. *Id.* at 277a.

The district court held that the Eleventh Amendment does not bar enforcement of the decree's provisions. Pet. App. 245a-275a. The court reasoned that, because petitioners seek prospective relief against state officials, this case "falls squarely within the *Ex Parte Young* exception to the Eleventh Amendment." *Id.* at 246a n.197.

Relying on *Local Number 93, International Association of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986), the district court rejected petitioner's contention that *Ex parte Young*, 209 U.S. 123 (1908), does not justify enforcement of the decree against state officials unless a violation of the decree independently violates federal law and is remediable under Section 1983. The court held that under *Firefighters*, a federal court may order relief in a consent decree that exceeds the requirements of federal law as long as the decree resolves a dispute within the court's subject matter jurisdiction, comes within the general scope of the case

made by the pleadings, and furthers the objectives of the law upon which the complaint was based. Pet. App. 247a. The court concluded that the necessary implication of *Firefighters* is that a court may enforce provisions in the decree that satisfy those standards. *Id.* at 248a-260a. The court noted that respondents did not argue that the provisions of the decree at issue here fail to satisfy the *Firefighters* standards. The court also independently concluded that the provisions satisfy those standards. *Id.* at 260a-275a.

In rejecting respondent's Eleventh Amendment argument, the district court also observed that it would "detract from the integrity of the court" to allow state defendants "to avoid bargained-for obligations while receiving the benefit of escaping litigation and potential liability." Pet. App. 259a. The court added that "such decree nullification would leave little incentive for future parties to enter into voluntary agreements, which avoid often protracted and time-consuming litigation." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-53a. The court held that under *Ex parte Young*, prospective relief in a consent decree may be enforced against state officials only to the extent that a violation of the decree also independently violates a "specific statutory provision that is actionable under § 1983." *Id.* at 28a. Relying on prior circuit precedent, the court concluded that while *Firefighters* authorizes a court to enter a consent decree that includes provisions that exceed the requirements of federal law, it does not authorize a court to enforce those provisions against state officials. *Id.* at 21a-23a.

The court of appeals also held that respondents did not waive the State's immunity by voluntarily seeking entry of the consent decree. Pet. App. 39a-42a. The

court acknowledged that "[a] consent decree is akin to a contract yet also functions as an enforceable judicial order." *Id.* at 7a (internal quotation marks and citation omitted). The court also recognized that the consent decree at issue in this case "contemplates continuing oversight of the agreement by the district court." *Id.* at 8a-9a. Nonetheless, the court of appeals concluded that respondents had not "unequivocally expressed" an intent to waive Eleventh Amendment immunity. *Id.* at 41a. In support of that conclusion, the court noted that respondents had not conceded liability, that they had raised an Eleventh Amendment defense in district court after petitioners moved to enforce the consent decree, and that respondents were defendants in the underlying litigation. *Id.* at 41a-42a.

SUMMARY OF ARGUMENT

At the urging of the State's officials, the consent decree entered by the district court in this case awards prospective relief against state officials based on alleged violations of federal law. Enforcement of the decree does not violate the Eleventh Amendment for two reasons.

I. First, this Court's cases establish that a State waives its immunity from suit when it voluntarily submits its rights for determination by a federal court. *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002). A State that urges a federal court to enter a consent decree does precisely that. An essential characteristic of a consent decree is that it emanates from the parties' voluntary agreement. At the same time, it is a judgment of a court that finally resolves claims within the court's jurisdiction. Accordingly, when a State seeks to have a consent decree embodied in a federal court order, it voluntarily submits its rights for judicial determination and waives its immunity from suit.

That waiver encompasses not only entry of the decree, but also its enforcement. By definition, a consent decree is an agreement that the parties intend to be judicially enforceable. The agreement in this case is no exception. It specifies that it creates enforceable obligations, and it expressly authorizes the beneficiaries of the decree to seek enforcement of those obligations.

Even if the State's officials had not so clearly consented to the decree's enforcement, the court would have had authority to enforce it based on the officials' consent to the decree's entry. Under this Court's decisions, the Eleventh Amendment has no application to an ancillary proceeding to enforce a judgment against a State, as long as the court legitimately acquired jurisdiction over the State in the original proceeding that led to the judgment. *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906). That principle is applicable here. Having acquired jurisdiction over state officials for purposes of entering the decree based on their consent, the court had ancillary authority to enforce the decree against them without their consent.

Other important considerations support the conclusion that a State that seeks entry of a consent decree waives any Eleventh Amendment objection to its enforcement. First, it is inconsistent for a State both to consent to the entry of an enforceable decree and then deny that a court has jurisdiction to enforce the decree. Second, permitting a State to make both claims would produce unfair results. It would allow a State to avoid its bargained for obligations, while retaining the benefit of concessions it obtained on other issues; and it would mean that a State that has voluntarily entered a decree would be free to disavow the judgment at any time.

Such a rule also would significantly undermine the authority and judgments of Article III courts in cases that are properly before them.

To the extent that a decree contains provisions that are inequitable, a State may seek the decree's modification. But having consented to entry of a decree, a State may not simply refuse to comply and then resist enforcement on Eleventh Amendment grounds.

II. The decree in this case is also enforceable under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Under that doctrine, a suit that alleges a violation of federal law and seeks prospective relief against state officials does not implicate the Eleventh Amendment. The decree in this case awards prospective relief against state officials based on alleged violations of federal law. It therefore falls squarely within the *Ex parte Young* doctrine. Moreover, in exercising their authority under *Ex parte Young*, federal courts are not limited to issuing injunctions and hoping for compliance; they also have authority to enforce their injunctions.

The court of appeals did not question the district court's authority to enter the decree. Instead, it concluded that the district court lacked authority to enforce the decree except to the extent that petitioners could show that a violation of the decree independently violates the federal law the suit was brought to enforce and that such a violation of law is actionable under 42 U.S.C. 1983. But if a federal court can validly enter a decree, it can surely enforce it. Any other rule would allow state officials who have urged a court to award relief that exceeds the requirements of federal law to disregard with impunity the very order they sought.

The court of appeals concluded that it violates state sovereignty to require state officials to comply with requirements that exceed those imposed by federal law.

But this Court has made clear that state officials may settle litigation through a consent decree that contains relief that exceeds what federal law requires. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). State officials need not enter into such a decree. But if they do, a federal court may enforce the decree to the same extent that it may enforce any other valid judgment.

ARGUMENT

JUDICIAL ENFORCEMENT OF THE CONSENT DECREE IN THIS CASE DOES NOT VIOLATE THE ELEVENTH AMENDMENT

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit * * * commenced or prosecuted against one of the United States by Citizens of another State." The principle of sovereign immunity embodied in the Eleventh Amendment also extends to suits against a State brought by citizens of the same State. *Hans* v. *Louisiana*, 134 U.S. 1 (1890).

Petitioners' action to enforce the consent decree in this case does not implicate the Eleventh Amendment for two reasons. First, a State's immunity from suit in federal court is "a personal privilege which it may waive at pleasure." *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883). When respondents consented to entry of the decree, they waived whatever immunity they possessed from actions to enforce the decree against them. Second, the decree in this case provides prospective relief against state officials based on alleged violations of federal law. Under the doctrine of *Ex parte Young*, the Eleventh Amendment does not bar enforcement of such a decree.

I. A STATE THAT VOLUNTARILY SEEKS ENTRY OF A CONSENT DECREE IN FEDERAL COURT WAIVES ITS IMMUNITY FROM ACTIONS TO ENFORCE THAT DECREE

A. A State Waives Its Immunity When It Voluntarily Submits Its Rights For Judicial Determination

1. This Court's precedents firmly establish that a State waives its immunity from suit when it invokes federal court jurisdiction or otherwise voluntarily submits its rights for judicial determination. *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). For example, in *Clark*, the Court held that a State that made a "voluntary appearance" in federal court by intervening to assert a claim to money sought by the plaintiff had waived its immunity from suit. 108 U.S. at 447-448. Similarly, in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), the Court held that a State that voluntarily filed a proof of claim in bankruptcy waived its immunity respecting the adjudication of that claim.

Clark and *Gardner* involved States that entered federal court voluntarily rather than being brought in through coercive process. The waiver principle at issue here, however, also applies when a State is brought into federal court through coercive process, but then voluntarily submits its rights for judicial determination rather than asserting an immunity defense. *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906).

Gunter involved a suit to enforce a federal court decree. In earlier litigation, a railroad had sued to enjoin the collection of taxes. The State, through the state officials who were named as defendants, did not interpose an Eleventh Amendment defense, but instead litigated the case on the merits. The district court enjoined the collection of taxes, and this Court affirmed.

Humphrey v. *Pegues*, 83 U.S. (16 Wall.) 244 (1872). When the railroad later sought to enforce the decree in the district court, the State argued that, by virtue of the Eleventh Amendment, it was not bound by the original decree. The Court rejected that contention, explaining, *inter alia*, that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." 200 U.S. at 284 (citing *Clark* v. *Barnard*, 108 U.S. at 447). The Court also concluded that the state officers' participation in the prior proceedings was on behalf of the State and therefore bound the State. 200 U.S. at 284-289. The Court explained that the State officers were "the agents voluntarily appointed by the State to defend its rights and submit them to judicial determination." *Id.* at 289.

The Court also rejected the State's contention that it could renew its claim of immunity as a defense to the motion to enforce the decree. The Court held that "[n]one of the prohibitions * * * of the [Eleventh] Amendment * * * relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in submitting its rights to judicial determination." *Gunter*, 200 U.S. at 292. The Court emphasized that the claim that the Eleventh Amendment "control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion." *Ibid.*

2. In *Lapides*, the Court held that *Clark*, *Gardner*, and *Gunter* establish a general principle that a State

waives its immunity from suit when it voluntarily invokes a federal court's jurisdiction or otherwise submits its rights for judicial determination. 535 U.S. at 620. That principle, the Court explained, is supported by two important considerations. First, it "would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Lapides*, 535 U.S. at 619. Second, "a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results." *Ibid.*

Applying the general principle that a voluntary submission to a federal court waives immunity from suit, the *Lapides* Court held that the State of Georgia waived its immunity when it removed a case from state court to federal court. The Court recognized that the State had been sued as a defendant and thus was not a voluntary party to the litigation. 535 U.S. at 620. The Court stressed, however, that the State had voluntarily removed the case to federal court. *Ibid.* In doing so, the State had "voluntarily invoked the federal court's jurisdiction" and waived its immunity from suit. *Ibid.*

The Court rejected the State's contention that equating removal with waiver violates the principle that a waiver of immunity requires a clear intent to waive. The Court explained that waiver in the litigation context "rests upon the [Eleventh] Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire." 535 U.S. at 620. Accordingly, "[t]he relevant 'clarity' here must focus on

the litigation act the State takes that creates the waiver. And that act—removal—is clear." *Ibid.*

The Court also found unpersuasive the State's claim that waiver should not be found because it joined in removal for a benign reason—to afford individual state officers who were also named as defendants the generous interlocutory appeal provisions available in federal court. The Court concluded that "the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others." 535 U.S. at 621.

Finally, the Court rejected the State's argument based on *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945), that the state attorney general's absence of authority under state law to waive the State's sovereign immunity precluded a finding of waiver. The Court held that whether litigation conduct amounts to a waiver of Eleventh Amendment immunity is a question of federal law, and that, under the applicable federal rule, a state attorney general's invocation of federal-court jurisdiction waives a State's immunity from suit. *Lapides*, 535 U.S. at 622. The Court overruled *Ford* "insofar as it would otherwise apply." *Id.* at 623.

B. A State That Consents To Entry Of A Judicial Decree Voluntarily Submits Its Rights For Judicial Determination And Waives Immunity From Actions To Enforce The Decree

1. Under the voluntary submission principle reaffirmed in *Lapides*, a State that urges a court to adopt a consent decree waives any Eleventh Amendment objection to the court's entry of that decree. A State's action in seeking entry of a consent decree is entirely voluntary. Indeed, "the voluntary nature of a consent

decree is its most fundamental characteristic." *Local Number 93, Int'l Assoc. of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 521-522 (1986). At the same time, a consent decree is not merely a private contract. It is also a judgment of a court that finally resolves claims within the court's jurisdiction. *United States* v. *Swift & Co.*, 286 U.S. 106, 116-117 (1932). The decree may provide broader relief "than a court could have decreed after a trial," although it must "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction," come "within the general scope of the case made by the pleadings," and further "the objectives of the law upon which the complaint was based." *Firefighters*, 478 U.S. at 525 (internal quotation marks and citation omitted). Accordingly, when a State seeks to have a consent decree embodied in a federal court order, it voluntarily submits its rights for judicial determination. *Lapides*, 535 U.S. at 620. Under this Court's decisions, such a voluntary submission waives any Eleventh Amendment objection to a court's entry of the decree.

2. By urging a court to adopt a consent decree, a State not only waives any Eleventh Amendment objection to entry of the decree. It also waives any Eleventh Amendment objection to its judicial enforcement. By definition, a consent decree "is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). In fact, the prospect of enforcement by the court that enters the consent decree is often the reason that parties choose consent decrees over private contractual settlements. As this Court has explained, out-of-court settlements "suffer the decisive

handicap of not being subject to continuing oversight and interpretation by the court," while consent decrees enable a court to draw on a "flexible repertoire of enforcement measures." *Firefighters*, 478 U.S. at 523-524 n.13 (internal quotation marks and citation omitted); accord *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 380-381 (1994).

The decree in this case leaves no doubt that the parties intended for it to be judicially enforceable. It specifies that it contains "mandatory, *enforceable* obligation[s]," Consent Decree para. 302 (emphasis added), and it expressly authorizes petitioners to "request relief from the Court" if the respondents' future activities do not "comport with the terms and intent of [the] Decree," *id.* at para. 303. Thus, just as respondents consented to entry of the decree, they also consented to its enforcement.

3. Even if respondents had not so explicitly consented to the decree's enforcement, the court would have had authority to enforce it based on respondents' consent to its entry. Having acquired jurisdiction over respondents for purposes of entering the decree based on their consent, the court had ancillary authority to enforce the decree against them without their consent. *Gunter*, 200 U.S. at 292. As explained in *Gunter*, the Eleventh Amendment does not "control a court of the United States in administering relief" where the court is acting "in a matter ancillary to a decree rendered in a cause over which it had jurisdiction." *Ibid.*

Gunter involved a fully litigated judgment. But since consent decrees are "subject to the rules generally applicable to other judgments and decrees," *Rufo* 502 U.S. at 378, the same principle applies when a court seeks to enforce a consent decree. Just as a court has inherent authority to enforce its litigated judgments, it likewise

has inherent authority to enforce its consent judgments.

The Court's decision in *Kokkonen* is instructive. There the Court held that a federal court does not have inherent authority to enforce a settlement agreement that is not embodied in a court order. The Court made clear, however, that the situation is different when an agreement is embodied in a court order. The Court specifically explained that "if the parties' obligation to comply with the terms of [a] settlement agreement" is "made part of" a court order—"either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order," then "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." 511 U.S. at 381. Other decisions similarly recognize a court's inherent authority to enforce a consent judgment. *Spallone* v. *United States*, 493 U.S. 265, 276 (1990) ("In selecting a means to enforce the consent judgment, the District Court was entitled to rely on the axiom that 'courts have inherent power to enforce compliance with their lawful orders through civil contempt.'") (citation omitted); *Firefighters*, 478 U.S. at 518 ("noncompliance with a consent decree is enforceable by citation for contempt of court"). Because respondents in this case consented to entry of the decree, the court had inherent authority to enforce the decree against them.

C. The Considerations That Underlie The Voluntary Submission Doctrine Apply With Particular Force Here

The considerations that underlie the voluntary submission doctrine strongly support the conclusion that a State that seeks entry of a consent decree by a federal district court waives any Eleventh Amendment objection to enforcement of the decree. In such a case, entry of the decree is not merely the ultimate consequence of a State's litigation judgment at an earlier stage of the case. Rather, the State, by consenting to the decree, has consented to that very exercise of the core "judicial Power of the United States" (U.S. Const. Art. III) of entering a judgment in the case. In these circumstances, it truly "would seem anomalous or inconsistent" for a State both to consent to the entry of a decree, and then deny that a court has jurisdiction to enforce the decree. *Lapides*, 535 U.S. at 619; cf. *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001).

Equally important, permitting a State to make both claims "could generate seriously unfair results." *Lapides*, 535 U.S. at 619. A consent decree ordinarily reflects a compromise: "[I]n exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). If a State could assert an immunity from enforcement of a decree to which it consented, it would allow the State to avoid its bargained-for obligations, while retaining the benefit of concessions it obtained on other issues. *Kozlowski* v. *Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989). Moreover, it would mean that despite voluntarily entering into a consent decree, a State would be free at any time to dis-

avow the judgment on Eleventh Amendment grounds. *Mitchell* v. *Commission on Adult Entm't Establishments*, 12 F.3d 406, 408-409 (3d Cir. 1993). "[T]hose who wrote the Eleventh Amendment" did not "intend to create that unfairness." *Lapides*, 535 U.S. at 622. Nor did those who wrote the Eleventh Amendment intend to allow a party to so disregard the judgment of an Article III court. See *Kokkonen*, 511 U.S. at 380-381; *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

Permitting States to engage in such tactics also would not serve the long-term interests of the States generally. As the district court explained, "principles of comity and federalism are furthered when state defendants draft their own documents setting out the means by which they will come into compliance with federal law." Pet. App. 258a. "To the extent such documents are later held unenforceable by federal courts, the incentives for plaintiffs to enter into such voluntary agreements with defendants are lessened if not wholly removed." *Ibid.*

A State that has entered into a decree may have legitimate reasons for wanting to be relieved of obligations imposed by a consent decree. A State in that situation, however, is not without recourse. Federal Rule of Civil Procedure 60(b)(5) expressly permits a litigant to seek modification or vacatur of a decree when prospective enforcement is no longer equitable. In *Rufo*, the Court held that courts should apply a particularly flexible modification standard in cases where a decree constrains the authority of a public entity. 502 U.S. at 383. To warrant a modification, a public entity need only show "a significant change either in factual conditions or in law." *Id.* at 384. A court should then modify the decree in a way that is

tailored to the changed circumstance. *Id.* at 391. A lesser showing is required with respect to provisions in the decree that do not "arguably relate[] to the vindication of a [federal] right." *Id.* at 383-384 n.7. In such circumstances, a court should modify the decree if the party seeking modification has a "reasonable basis for its request." *Ibid.*

Respondents remain free to attempt to persuade the district court that the equitable standards set forth in *Rufo* warrant a modification of one or more provisions in the consent decree. They are not free, however, to disregard the decree and then invoke the Eleventh Amendment as a bar to the decree's enforcement.

D. The Court Of Appeals' Analysis Is Unpersuasive

In holding that respondents were free to assert an Eleventh Amendment defense to enforcement of the decree, the court of appeals reasoned that respondents had not "unequivocally expressed" an intent to waive the States's Eleventh Amendment immunity. Pet. App. 41a. As support for that conclusion, the court observed that respondents had not conceded liability, that respondents had raised the Eleventh Amendment defense in district court after petitioners moved to enforce the consent decree, and that respondents were defendants in the underlying litigation. *Id.* at 41a-42a. That rationale is seriously flawed.

As *Lapides* makes clear, in determining whether a State has waived its Eleventh Amendment immunity through litigation conduct, the question is not whether the State has "unequivocally expressed" an intent to waive its immunity. *Lapides*, 535 U.S. at 620. Instead, the question is whether the State has clearly submitted its rights to a federal court's determination. *Ibid.* The reason is that waiver through litigation conduct rests

upon the need "to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Ibid.* A State that seeks entry of a consent decree unequivocally submits its rights to a federal court's determination. That act is therefore sufficient to waive the State's immunity.

The court of appeals' additional observations are all beside the point. A concession of liability is not a precondition to entry of a consent decree, *Lawyer* v. *Department of Justice*, 521 U.S. 567, 578-579 & n.6 (1997), and respondents' failure to make such a concession does not alter the crucial fact that respondents voluntarily entered into a consent decree and urged the court to embody the decree in an enforceable judgment.

Respondents' assertions of Eleventh Amendment immunity in response to petitioners' motion to enforce the decree came too late. Under this Court's cases, once the State waives its immunity by submitting its rights to a federal court's determination, it cannot rescind its waiver. Otherwise, the State could engage in the very litigation tactics that the voluntary submission doctrine is designed to prevent.

Finally, respondents' status as defendants has no relevance here. *Gunter* and *Lapides* both involved state parties who were initially brought into the litigation involuntarily as defendants. In both cases, however, the state defendants subsequently submitted their rights to a federal court determination, and that conduct waived immunity from suit. The situation is the same here.[2]

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[2] The court of appeals did not address respondents' contention that a finding of waiver is precluded because the officials who entered the decree lacked state-law authority to waive the State's immunity. That argument, however, is foreclosed by *Lapides*. 535 U.S. at 623 (state attorney general's invocation of federal court jurisdiction waives the State's immunity from suit, without regard to whether the attorney general has authority under state law to waive).

II. THE ELEVENTH AMENDMENT DOES NOT BAR ENFORCEMENT OF A CONSENT DECREE THAT PROVIDES PROSPECTIVE RELIEF AGAINST STATE OFFICIALS BASED ON ALLEGED VIOLATIONS OF FEDERAL LAW

There is a second reason that the Eleventh Amendment does not bar enforcement of the decree. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and the principles that govern the entry and enforcement of consent decrees, the Eleventh Amendment does not bar enforcement of a consent decree that provides prospective relief against state officials based on alleged violations of federal law.

A. Under *Ex parte Young*, a suit that alleges a violation of federal law and seeks prospective relief against state officials does not implicate the Eleventh Amendment. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.* v. *Public Service Comm'n*, 535 U.S. 635, 645 (2002). "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.* at 646.

Petitioner's original complaint in this case alleged an ongoing violation of federal requirements imposed by the EPSDT program under the Medicaid statute and

sought prospective relief against state officials. Petitioners' suit therefore falls squarely within the *Ex parte Young* doctrine. The relief ordered by the consent decree also falls within the *Ex parte Young* doctrine. The consent decree ordered prospective relief against state officials based on claimed violations of federal law. Finally, judicial enforcement of the decree also falls within the *Ex parte Young* doctrine. As this Court has explained, "[i]n exercising their prospective powers under *Ex parte Young*, * * * federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978).

B. The court of appeals did not hold that the Eleventh Amendment precluded the district court from entering the consent decree in the first place. Instead, it concluded that the Eleventh Amendment bars enforcement of the decree unless petitioners can show that a violation of the decree also independently violates a provision of federal law governing the EPSDT program that is actionable under 42 U.S.C. 1983. The court reasoned that even if a court has authority to enter a consent decree that contains relief that is broader than the court could have awarded after a trial, a court "must fall back on its own jurisdiction when it issues an order *enforcing* the decree." Pet. App. 27a. In the court's view, that means that a federal court is limited to remedying practices that independently violate federal law and that are remediable under Section 1983. *Ibid.*

That theory directly conflicts with decisions of this Court that make clear that a court has inherent authority to enforce a valid decree, including decrees that are entered by consent. *Kokkonen*, 511 U.S. at 381;

Spallone, 493 U.S. at 276; *Firefighters*, 478 U.S. at 518; *Hutto*, 437 U.S. at 690; *Gunter*, 200 U.S. at 292. As other courts of appeals have recognized, the rule that emanates from this Court's decisions is simple: "[i]f a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski*, 871 F.2d at 244; *Wisconsin Hosp. Ass'n* v. *Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (Posner, J.) ("[I]f a decree is valid an order enforcing it is not barred by the Eleventh Amendment."); see *Vecchione* v. *Wohlgemuth*, 558 F.2d 150, 158 (3d Cir.), cert. denied, 434 U.S. 943 (1977). Under the court of appeals' contrary view, state officials who have secured entry of a consent decree that contains relief that exceeds the requirements of federal law would be free the very next day to disregard the order they secured. *Vecchione*, 558 F.2d at 158. No decision of this Court suggests that state officials may so subvert the administration of justice in federal courts.

The court of appeals concluded that it is antithetical to principles of state sovereignty to require state officials to comply with requirements in a decree that exceed the requirements of the federal law that gave rise to the decree. But as this Court has explained, in order to "save themselves the time, expense, and inevitable risk of litigation," state officials may settle disputes "by undertaking [in a consent decree] to do more than [federal law] itself requires," and "more than what a court would have ordered absent the settlement." *Rufo*, 502 U.S. at 389 (citation omitted); *Firefighters*, 478 U.S. at 525. State officials are under no compulsion to seek entry of such decrees. But once such a decree is entered with the consent of state officials, it has the same status as any other judgment of a federal court. State officials have a duty to comply with the require-

ments in the decree, and, if they do not, federal courts have authority to enforce compliance.

As previously discussed, to the extent that prospective enforcement of a decree is inequitable, state officials may seek its modification. But they may not unilaterally disregard the court's judgment and then resist enforcement of the judgment on Eleventh Amendment grounds.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 02-628

IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, Carla Frew, et al.,

Petitioners,

v.

DON GILBERT, Commissioner of the Texas Health and Human Services Commission, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AARP, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE AMERICAN CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, CHILDREN'S RIGHTS, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE NATIONAL HEALTH LAW PROGRAM, AND NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Table of Contents

Statement of Interest 1

Statement of The Case 2

Summary of Argument 7

ARGUMENT 11

I. State Officials' Consent To A Federal Court's Decree Waives Eleventh Amendment Objection To Its Enforcement 11

II. The Eleventh Amendment Provides No Basis For Recognizing A Category Of Federal Court Orders That Are "Valid" – But Not Enforceable 13

A. The Eleventh Amendment *Does Not* Divest A Federal Court Of "Inherent Jurisdiction" To Enforce Its Orders 13

B. The Fifth Circuit Rule Is Anomalous And Unfair 17

III. The Appeal's Court's Limitations On Enforceable Decrees Are Unwarranted 20

A. State Officials May Undertake – And Federal Courts, Enforce – Obligations That Go Beyond Compliance With Federal Law 21

B. The Fifth Circuit's Restriction, To Obligations To Which Plaintiffs Have A § 1983 Right, Is Wholly Unwarranted 22

IV. The Fifth Circuit's Rules Would Seriously And Unnecessarily Undermine Important Public Interests 27

A. The Decision Makes Settlements With State Officials A Practical Impossibility 27

B. The Fifth Circuit's Rules Are Not Necessary To Protect Any *Legitimate* State Interest 29

Conclusion 30

Table of Authorities

Federal Cases

Air Courier Conference v. American Postal Workers Union, 498 U.S. 517 (1991) 25

Anderson v. Dunn, 18 U.S. 204 (1821) 13, 20

Antrican v. Odom, 290 F.3d 178, 191(4th Cir. 2002) ... 25

Badgley v. Santacroce, 800 F.2d 33 (2d Cir. 1986) ... 13,16

Beckett v. Air Line Pilots Ass'n, 995 F.2d 280 (D.C. Cir. 1993) 24

Bell v. Wolfish, 441 U.S. 520 (1979) 23

Blessing v. Freestone, 520 U.S. 329 (1997) 7

Clark v. Bernard, 108 U.S. 436 (1883) 12, 26

Cooper v. Aaron, 358 U.S. 1 (1958) 16, 18

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 9, 24

Davis v. Passman, 442 U.S. 228 (1979) 25

Dennis v. Higgins, 498 U.S. 439 (1991) 23

Dugas v. American Surety Co., 300 U.S. 414 (1937) 14

Edelman v. Jordan, 415 U.S. 651 (1974) 19, 26

Evans v Jeff D., 475 U.S. 717 (1986) 28, 30

In re Factor VIII or IX Concentrate Blood Prods. Litig.,
159 F.3d 1016 (7th Cir. 1998) 19

Fairmont Creamery Co. v. Minnesota,
275 U.S. 70 (1927) 27

Farrar v. Hobby, 506 U.S. 103 (1992) 14

Firefighters v. City of Cleveland,
478 U.S. 501 (1986) ..... *passim*

FTC v. National Lead Co., 352 U.S. 419 (1957) 21

Golden State Transit Corp. v. Los Angeles,
493 U.S. 103 (1989) 7, 9, 23, 25

Green v. Mansour, 474 U.S. 64 (1985) 9, 24

Griffin v. Prince Edward County Sch. Bd.,
377 U.S. 218 (1964) 29

Guaranty Nat'l Ins. Co. v. Gates,
916 F.2d 508 (9th Cir. 1990) 25

Gunter v. Atlantic Coast Line R. Co.,
200 U.S. 273 (1906) ..... *passim*

Hewitt v. Helms, 482 U.S. 755 (1987) 17

Hook v Arizona Dep't of Corrections,
972 F.2d 1012 (9th Cir. 1992) 18

Hormel v. Helvering, 312 U.S. 552 (1941) 19

Hudson v. Chicago Teachers Union,
922 F.2d 1306 (7th Cir.1991) 12, 30

Hutto v. Finney, 437 U.S. 678 (1979) 15, 16, 27, 30

Idaho v. Couer d'Alene Tribe, 521 U.S. 261 (1997) 15

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 14, 16, 20

Komyatti v Bayh, 96 F.3d 955 (7th Cir. 1996) . 16, 17, 23, 29

Kozlowski v. Coughlin,
871 F.2d 241 (2d Cir. 1989) 8, 14, 19

Ku v. Tennessee, 332 F.3d 431 (6th Cir. 2003) 26

Labette County Comm'rs v. United States
ex rel. Moulton, 112 U.S. 217 (1884) 14

Lapides v. Board of Regents, University System
of Georgia, 535 U.S. 613 (2002) ..... *passim*

Lawyer v. United States Dep't of Justice,
521 U.S. 567 (1997) 22

Lelsz v. Kavanagh,
807 F.2d 1243 (5th Cir. 1987) 6, 14, 22, 23

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) 13, 24

Maher v. Gagne, 448 U.S. 122 (1980) 22

Maness v. Meyers, 419 U.S. 449 (1975) 18

Marek v Chesny, 473 U.S. 1 (1985) 28

Milliken v. Bradley, 418 U.S. 717 (1974) 21

Montgomery v. Maryland,
266 F.3d 334 (4th Cir. 2001) 28

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 24

National Society of Professional Engineers
v. United States, 435 U.S. 679 (1978) 21

New York State Ass'n for Retarded Children, Inc.
v. Carey, 596 F.2d 27 (2d Cir. 1979) 11

Northwest Airlines, Inc. v. County of Kent,
510 U.S. 355 (1994) 25

Pasadena City Bd. of Educ. v. Spangler,
427 U.S. 424 (1976) 26

Peacock v. Thomas, 516 U.S. 349 (1996) 16

Pennhurst State School v. Halderman,
465 U.S. 89 (1984) 23

Prout v. Starr, 188 U.S. 537 (1903) 15

Puerto Rico Aqueduct & Sewer Auth.
v. Metcalf & Eddy, 506 U.S. 139 (1993) 12

Railway Employees v. Wright, 364 U.S. 642 (1961) 30

Riggs v. Johnson County, 73 U.S. 166 (1867) 14

Root v. Woolworth, 150 U.S. 401, 412 (1893) 8, 15

Rufo v. Inmates of Suffolk Co. Jail,
502 U.S. 367, 378 (1992) ..... *passim*

Saahir v. Estelle, 47 F.3d 758 (5th Cir.1995) 6

Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 25

Siegert v. Gilley, 500 U.S. 226 (1991) 23

Spallone v. United States, 493 U.S. 265 (1989) 16, 30

St. Louis Min. & Mill. Co. v. Montana Mining Co.,
171 U.S. 650 (1898) 28

Steel Co. v. Citizens for Better Env't,
523 U.S. 83, 89 (1998) 9, 25

Suter v. Artist M., 503 U.S. 347 (1992) 9, 21, 23, 27

Swift Co. v. United States, 276 U.S. 311 (1928) ... 9, 19-21

Syngenta Crop Protection, Inc. v. Henson,
123 S. Ct. 366 (2002) 16

United States v. $92,422.57,
307 F.3d 137 (3rd Cir. 2002) 30

United States v. Armour, 402 U.S. 673 (1971) 27, 28

United States v. Cook County,
167 F.3d 381 (7th Cir. 1999) 15, 17

United States v. ITT Continental Baking,
420 U.S. 223 (1975) 27

United States v. Krilich, 303 F.3d 784 (7th Cir. 2002) ... 13

United States v. Swift & Co., 286 U.S. 106 (1932) 13

Vecchione, v Wohlgemuth,558 F.2d 150 (3d Cir. 1977) .. 17

Verizon Maryland Inc. v. Public Serv. Comm'n,
535 U.S. 635 (2002) 25

Walker v. Birmingham, 388 U.S. 307 (1967) 18

*Washington v. Washington State Commercial
Passenger Fishing Vessel Ass'n.*, 443 U.S. 658 (1979) . 16

Watson v. Texas, 261 F.3d 436 (5th Cir. 2001) 6

Westside Mothers v. Haveman, 133 F. Supp. 2d 549 (E.D.
Mich. 2001), *rev'd in part*, 289 F.3d 852 (6th Cir. 2002) . . 7

Williams v. First Nat'l Bank, 216 U.S. 582 (1910) 28

Wisconsin Dep't of Corrections v. Schacht,
524 U.S. 381 (1998) 10, 26, 29

Wisconsin Hosp. Ass'n v Reivitz,
820 F.2d 863 (7th Cir. 1987) 12, 15, 16

Ex Parte Young, 209 U.S. 123 (1908) ..... *passim*

Statutes and Rules

28 U.S.C.§1292(a)(1) 18

42 U.S.C. § 671(a)(15) 23

42 U.S.C. § 1396a(a)(43) 2, 21

42 U.S.C. §1396d(r) 2

42 U.S.C. § 1983 ..... *passim*

Fed. R. Civ. P. 2 24

Fed. R. Civ. P. 16 ..... 28, 29

Fed. R. Civ. P. 23(e) 3

Fed. R. Civ. P. 60(b)(5) 8, 11, 21

Fed. R. Civ. P. 68 29

Other Authorities

BLACK'S LAW DICTIONARY (6th ed.1990) 12

COMMITTEE ON ECONOMIC DEVELOPMENT,
CHILDREN IN NEED (1989) 3

A. KRONMAN & R. POSNER, THE ECONOMICS
OF CONTRACT LAW (1979) 3

Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887 29

Statement of Interest*

Amici curiae are national membership organizations and civil rights advocates, who share an interest in assuring that obligations imposed under the Constitution and federal health, welfare, and civil rights statutes – many of which have been enacted for the benefit and protection of the most vulnerable Americans – are fulfilled.

Amici and their local affiliates have participated, as both counsel and party, in scores of suits that, like this one, sought government officials' compliance with federal law and were resolved consensually, with a federal court's entry of a consent decree. These cases involve matters as varied as prevention of sexual abuse of patients in State institutions for the mentally ill, *Caroline C. v. Johnson* (D. Neb. 1998); appropriate foster care for abandoned and neglected children, *Juan F. v. Rowland* (D. Conn. 1991); medical services for children with severe physical and developmental disabilities, *Chisholm v. Hood* (E.D. La. 1998); and desegregation of public housing, *Thompson v. H.U.D.* (D. Md. 1996). Many of these decrees are still in force – though, consistently with governing equitable principles, a substantial number have been modified, and others, vacated.

This long and diverse experience with consent decrees – and even more extensive experience in litigation where consensual resolution proved unattainable – confirms what this Court's cases have consistently taught: that important public interests are served when parties are able to reach – and courts empowered to enforce – negotiated settlements. Our experience convinces us that, in addition to the substantial judicial and litigation resources conserved, when adversarial proceedings are avoided official defendants are more likely to achieve good-

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*This brief was not authored in any part by counsel for a party, and no one other than *Amici* made a monetary contribution to its preparation or submission. Both parties have consented to its submission.

faith compliance with federal law, more quickly.

As we explain below, the appeals court decision in this case is untenable as a matter of legal principle. The rules imposed by the Fifth Circuit concerning the legal effect of consent decrees and federal courts' power to compel compliance with them are irreconcilable with numerous decisions of this Court.

But this is also a case where settled law draws strong reenforcement from fundamental policy concerns, and in submitting this Brief, we seek to alert the Court to the important practical reasons for repudiating the decision below. Not only does the Fifth Circuit rule place federal courts in the constitutionally intolerable position of entering decrees that they may not enforce if disobeyed, but, if sustained, it would operate highly unfairly in cases (including *Amici*'s) where consent decrees are now in place, permitting defendants to violate bargained-for, ostensibly binding obligations, without any showing that their operation has become inequitable.

At least equally troubling, we believe, would be the systemic consequences of endorsing the approach taken below. By effectively denying consent decrees with State officials *any* independent, binding force, the Fifth Circuit's rules would make negotiated settlement a practical impossibility in a broad array of cases – a prospect that would be no more welcome by these officials than it is by *Amici* and others who sue them in federal court.

Statement of The Case

This suit was filed in 1993 to compel defendants, Texas officials, to fulfil their obligation to provide indigent children with Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services, as required by the Medicaid Act. *See* 42 U.S.C. §§1396a(a)(43)(A); (B); (C); 1396d(r). The complaint described a large-scale failure to provide children with

medical, dental, vision and hearing screens; with necessary corrective treatment; and with information about the EPSDT Program.[1]

In 1994, after extensive discovery and after the district court had certified the case as a class action, the parties undertook settlement negotiations. In late 1995, they reached an agreement settling most of the claims raised in the complaint and submitted it to the district court, jointly requesting that it be adopted as the court's decree. *See Frew v. Gilbert*, 109 F. Supp. 2d 579, 588 (E.D. Tex. 2000).[2] After conducting an evidentiary hearing, the district court adjudged the negotiated resolution "fair, reasonable, and adequate," *see* Fed. R. Civ. P.

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[1]As its title suggests, the central thrust of the statutory program is promotion of children's health through prevention, early detection and treatment. It is widely accepted that such an approach is a highly effective use of resources, *see* COMMITTEE ON ECONOMIC DEVELOPMENT, CHILDREN IN NEED (1989), and, as President Johnson emphasized in introducing the program, for children, the difference between early and late diagnosis can be the difference between full recovery and serious, lifelong health problems. 113 CONG. REC. 2883 (Feb. 8, 1967).

Congress also recognized that, despite the common sense of this preventative approach, (1) it represents a real break from the traditional mode of delivering health care to poorer children, which has relied heavily on *ad hoc* emergency care; (2) that effective prevention depends critically on information and outreach efforts that go beyond what health care providers have customarily undertaken; (3) and that these sort of services do not always fare well in competition with other medical services for State officials' resources and attention. Because Congress wanted to make clear that, these difficulties aside, promotion of children's health is a top federal priority (and to ensure that States, in accepting federal funds, would effectively honor that policy choice), the statutory provisions are written in unusually detailed and stringent terms.

[2]Earlier that year, the parties had presented the district court with an initial agreement – indicating at that time that Respondents' "final approval" would await their having"inform[ed] appropriate legislative and executive offices of the State of the content and potential financial implications of this agreement."

23(e), and – indicating that it was likely that plaintiffs "could have succeeded at trial" Order Entering Decree (Jan. 25, 1996) at 25 – entered the settlement as its order. The defendant officials did not appeal.

The decree is "a lengthy document," 300 F.3d at 353, one in which the officials, without conceding liability,¶301, committed to a "highly detailed and specific [set of] procedures relating to the EPSDT program," 300 F.3d at 535, and undertook to file quarterly reports informing the district court of the'"status of each activity'" required under the decree, ¶¶306-7.

The decree is phrased in terms that are unmistakably mandatory – and that expressly contemplate court enforcement. Thus, paragraph 6 states that "the parties agree [to] *and the Court orders* * * * " implementation of the measures provided for in the decree, *id.* (emphasis added), and another provision confirms that "'will'" – a term used throughout the decree – "creates a mandatory, *enforceable* obligation," ¶302 (emphasis added).

The officials – both in their presentation to the district court and within the decree's four corners – expressly acknowledged that the parties' agreement was "reached within the framework of federal law related to the EPSDT and Medicaid programs." ¶308.

In November 1998, Petitioners filed a motion alleging that the officials were in default on many of the obligations imposed under the consent decree. The district court conducted a five-day evidentiary hearing in March 2000, and in August 2000, issued an opinion finding that decree violations had been established in most of the areas about which Petitioners had

complained.[3] After rejecting defendants' arguments that enforcement of the decree was barred by the Eleventh Amendment, the district court entered an order requiring the officials to submit within 60 days a plan for coming into compliance with their consent decree obligations.

On Respondents' interlocutory appeal, the Fifth Circuit vacated the enforcement order, ruling that the district court had misconceived its power to compel compliance with its decree. The district court's cardinal error, the Fifth Circuit explained, had been in "focusing on the consent decree requirements" rather than "determin[ing] whether an alleged violation of the consent decree would constitute, *in the absence of the decree*, a statutory violation of the Medicaid Act remediable under § 1983." 300 F.3d at 537 (emphasis added).

Without questioning the district court's conclusions that each of the decree provisions defendants were found to be violating met the requirements established in *Firefighters v. City of Cleveland,* 478 U.S. 501, 525 (1986), *i.e.*, that each (1) "served to resolve a dispute within the court's subject matter jurisdiction," (2) "came within the general scope of the case made by the pleadings," and (3) "further[ed] the objectives of the law upon which the complaint was based," the Fifth Circuit

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[3]For example, the district court found that, although eligible children and their families are entitled to information about EPSDT – and the consent decree required officials to inform them effectively – "large numbers of class members" continued to be unaware of their entitlement to State-provided EPSDT services. 109 F. Supp. 2d at 590. The court found numerous violations respecting defendants' obligations to children in managed care: many were not receiving required immunizations and lead-poisoning screens, *see* 109 *id.* at 623-64, and some had been unable to obtain even emergency treatment for severe asthma attacks and dehydration, *id.* at 629. In addition, large numbers of plaintiff class members were receiving no dental care at all, *id.* at 602. *See id.* (noting result that emergency rooms were crowded with children, "suffering from acute forms of dental disease that, while easily preventable, often lead to [serious] health complications").

explained that the *Firefighters* standards govern "the *entry*" of consent decrees – and do not establish a court's jurisdiction "'to issue its own, different order enforcing * * * the decree.'" 300 F.3d at 541 (quoting *Lelsz v. Kavanagh,* 807 F.2d 1243, 1252 (5th Cir.), *reh'g en banc denied,* 815 F.2d 1034, *cert. dismissed,* 483 U.S. 1057 (1987)).

The court further noted that *Firefighters* had involved a decree with a municipal government defendant, rather than State officials entitled to Eleventh Amendment immunity, 300 F.3d at 543 & n.67. The Eleventh Amendment, the decision continued, is "a limitation on the federal courts judicial power," – one that can apply "[r]egardless of what the parties agree[] to in the consent decree," *id.* at 542. After ruling that defendants' litigation conduct did not amount to a waiver of Eleventh Amendment immunity, *id.* at 548-51[4] – and that federal courts' "inherent jurisdiction,"*id.* at 542, is insufficient to overcome an assertion of immunity – the Fifth Circuit reaffirmed that only those provisions that embody actual requirements of the federal Constitution or a federal statute could be subject of an enforcement order. *See id.* (citing *Lelsz* and *Saahir v. Estelle,* 47 F.3d 758 (5th Cir.1995)).

The court then construed Circuit precedent to impose a further limitation. In view of the rule limiting decree enforcement to provisions that "vindicate *federal rights*" – and

[4] The appeals court gave three reasons for declining to infer waiver: (1) that the decree "expressly stated * * * that 'Defendants do not concede liability,'" 300 F.3d at 549 (quoting ¶301); (2) that Respondents had "repeatedly raised in the district court an Eleventh Amendment defense to the enforcement of the decree," *id.*, and (3) that, unlike in *Watson v. Texas,* 261 F.3d 436 (5th Cir. 2001), and *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613 (2002), the officials here were "sued as defendants" and had not "voluntarily chosen to submit * * * to the jurisdiction of the federal court," 300 F.3d at 550. Seeing these as sufficient reason to find no waiver, the court declined to decide the Attorney General's State law authority to consent to the decree. *Id.* at 549.

of case law holding that not every violation of *federal law* is a deprivation of a "right," actionable under 42 U.S.C. § 1983, *see, e.g., Blessing v. Freestone,* 520 U.S. 329 (1997); *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103 (1989), the Fifth Circuit announced that:

> Before [a] district court can remedy a violation of a provision of [a] consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a *federal right,*" *i.e.*, "by showing (1) a statutory violation of a specific provision of [a federal statute] (2) which was intended to benefit plaintiffs, (3) which is not so vague and amorphous that its enforcement would strain judicial competence, and (4) which imposes a binding obligation on the states.

300 F.3d at 543. Accordingly, the district court's order, which did not reflect this sort of "particularized * * * analysis as to each alleged violation of the consent decree," *id.* at 542, could not stand.[5]

Summary of Argument

This Court's precedents stand emphatically against the proposition that the Eleventh Amendment creates a class of judicial decrees (or decree provisions) that are *valid* as entered, but unenforceable. Whether understood as resting primarily on (1) the rule that "affirmative litigation conduct," *Lapides,* 535 U.S. at 617, will waive an Eleventh Amendment defense or (2)

[5] The appeals court did not reach defendants' arguments that the district court had misinterpreted the consent decree, *see* 300 F.3d at 537. The Fifth Circuit did, however, reject Respondents' argument, grounded on the later-reversed district court decision in *Westside Mothers v. Haveman,* 133 F. Supp. 2d 549 (E.D. Mich. 2001), *rev'd in relevant part,* 289 F.3d 852 (6th Cir.), *cert. denied,* 123 S. Ct. 618 (2002), that there is a "'Spending Clause exception' to the *Ex Parte Young*" doctrine, 300 F.3d at 550. *See id.* ("For purposes of the Supremacy Clause and *Ex Parte Young,* the mandates set out in Medicaid statute are more than contractual; they are federal law").

the "principle that * * * [w]here the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution," *Root v. Woolworth*, 150 U.S. 401, 412 (1893); *see Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), the rule must be that "[i]f a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989).

In addition to its inconsistency with precedent, the Fifth Circuit's contrary rule is an affront to basic rule-of-law norms. Not only does it relegate federal courts to "hoping" that parties ostensibly bound by judgments will comply with them, but officials who are dissatisfied with decrees will have scant reason to use lawful, but more burdensome, procedures for obtaining relief from judgment. *See* Fed. R. Civ. P. 60(b)(5). Indeed, the Fifth Circuit's rule, which holds attacks on final judgment by parties who *have disobeyed them* to *less stringent* standards than objections to the *entry* of the same decree, is at odds with fundamental norms of judicial procedure.

To the extent the decision below is understood to have treated the decree as "invalid," *i.e.*, construing the Eleventh Amendment to impose stringent limitations – beyond the requirements of *Firefighters* – on provisions that may lawfully be *entered* as part of a federal consent decree, it is equally irreconcilable with this Court's teaching. First, there is no question that the dispute resolved was within the court's subject matter jurisdiction, and this Court has settled that when officials consent, federal courts have the power to enter decrees that include obligations that "spring from" or "relate to" federal law – and not just those which merely restate federal law requirements. *See Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 378 (1992).

The proposition that § 1983 imposes a further, "jurisdictional" limitation on federal courts' power to enter decrees is even more plainly mistaken. If decrees that go

further than the *federal law* minimum are permissible, *Rufo*, it follows that whether or not a provision falls within the *subset* of federal laws that are "federal rights" under § 1983 does not bear on a court's *power*. *See also Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998).

A rule that prevents federal courts from compelling compliance with consent decree requirements that are *also* obligations of federal law – on the ground that plaintiff would not have a § 1983 *right* in the absence of a decree – surely draws no support from *Ex Parte Young*. That doctrine aims to assure the supremacy of federal *law*, *Green v. Mansour*, 474 U.S. 64 (1985), and the Court has consistently sustained prospective relief against State officials in cases where violations of federal *law* are ongoing – but where plaintiff would likely not have a § 1983 "right." *E.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000); *see also Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992); *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting).

Indeed, settled principles establish that the § 1983 cause-of-action question is not a relevant one when enforcement of a court decree is sought. Defendants surely may waive an objection that a statute does not entitle plaintiffs to particular relief, *see Swift Co. v. United States*, 276 U.S. 311 (1928) ("*Swift I*"). That is what defendants typically do by entering consent decrees, *see id.*; *Suter*, 503 U.S. at 354 n.6. And plaintiffs who seek to compel compliance with an equity court's decree do not need a distinct, congressionally conferred cause of action to do so.

Unfairness to litigants in Petitioners' position and interference with orderly judicial administration are not the only ways in which the rules announced below fail to "make[] sense." *See Lapides*, 535 U.S. at 620. By limiting federal courts, confronting violations of consent decree provisions, to enjoining actions that would be unlawful "in the *absence* of a

decree," 300 F.3d at 537, the decision imposes an essentially prohibitive "disincentive to settle institutional reform litigation," *Rufo*, 502 U.S. at 389. A legal regime under which obligations that defendants stipulate to be "enforceable" may not be enforced – and plaintiffs who make significant concessions in negotiations are no better off than if no decree had been entered – is one that assures, as a practical matter, that cases against State officials will always be litigated to final judgment.

While the decision below may have afforded these Respondents a welcome "litigation advantage[]," *Lapides*, 535 U.S. at 620, its premises, if endorsed, would surely *constrict* the range of options available to State officials facing future federal lawsuits. To the extent that its limitations apply – as the decision said they do – "[r]egardless of what the parties agreed to in the consent decree," 300 F.3d at 542, they deny officials freedom to determine that State interests would be served by agreeing to undertake judicially enforceable obligations – or by not pressing a § 1983 defense. But even if that extreme formulation could be discounted, the practical reality will remain: plaintiffs who otherwise could and *would* negotiate consent decrees on terms the State would find preferable to what litigation would offer will refrain from doing so.

The legal rules imposed in the decision below are surely not necessary to advance any legitimate interests of State government. Officials are "under no compulsion," *see Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring), to agree to settlements; to make them judicially enforceable; or to enter into them before disputed legal or factual issues are determined. In every sense, the consent decree enforcement proceeding was "'the result of [Respondents'] voluntary act.'" *Lapides*, 535 U.S. at 620 (quoting *Gunter*, 200 U.S. at 284).

Finally, existing rules provide a means for defendants to

obtain relief even from voluntarily assumed decree obligations, when intervening events render continued compliance unexpectedly burdensome or otherwise inequitable, *see* Fed. R. Civ. P. 60(b)(5), and under this Court's precedents, such claims from official defendants are considered with special care, *see Rufo*. These substantial protections already in place make the appeals court's rules – and the unfairness and anomaly that they would entail – wholly unwarranted.

ARGUMENT

I. State Officials' Consent To A Federal Court's Decree Waives Eleventh Amendment Objection To Its Enforcement

As Petitioners' Brief explains – and numerous courts have decided, *see, e.g., New York State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (2d Cir. 1979) – defendants' consent to a court order embodying the provisions at issue is precisely the sort of "affirmative litigation conduct," *Lapides*, 535 U.S. at 617, that should preclude an Eleventh Amendment defense in a proceeding that seeks only prospective compliance with those obligations.

In a consent decree case, the relevant "litigation act," 535 U.S. at 620, is extraordinarily clear. Both parties represent to a federal court that they "desire and expect" that their "agreement * * * will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees," *Rufo*, 502 U.S. at 378.

Although the Fifth Circuit stressed that the officials had not "voluntarily invok[ed] the federal court's jurisdiction, but * * * were sued as defendants," Respondents' claim of Eleventh Amendment immunity does not relate to the *initial suit* – which clearly fell within the *Ex Parte Young* jurisdiction – but rather to the court's power to enforce decree provisions, which defendants had labeled "mandatory [and] enforceable" (¶302)

and had asked the court to "*order*" (¶6) (emphasis added). *See Wisconsin Hosp. Ass'n v Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (Posner, J.) (when decree "settle[s] a genuine, noncollusive case that was within the exception to the Eleventh Amendment that *Ex parte Young* created" enforcement proceeding does not "engage the Eleventh Amendment").[6]

Even more than in other cases where State officials elect to participate in federal litigation, *Clark v. Bernard*, 108 U.S. 436, 447 (1883), the federal court's *enforcement order* was the direct "result of [Respondents'] own voluntary act." *Lapides*, 535 U.S. at 620 (quoting *Gunter*, 200 U.S. at 284).[7]

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[6]Although the language of the decree in this case – and the conduct of Respondents – surely reinforce the soundness of finding waiver here, it is the nature of a consent judgment, *i.e.*, the parties' "desire and expect[ation]" that it will be enforced by the federal court, *Rufo*, 502 U.S. at 378, that warrants treating it as a waiver of immunity from enforcement. *See Lapides*, 535 U.S. at 623-24 (rules for inferring waiver from conduct should be "clear * * * [and] easily applied by both federal courts and the States themselves").

[7]The Fifth Circuit's other bases for finding no waiver fare no better. It can be of no moment that defendants had made Eleventh Amendment objections before or after decree entry – because the act of seeking entry of the decree was patently "inconsistent" with maintaining that agreed-to provisions are beyond a federal court's power to order. *See Lapides*, 535 U.S. at 619. Nor is the inference that defendants reserved an Eleventh Amendment defense by declining to admit *liability* a plausible one. Leaving aside differences between immunity and liability, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993), such a provision is unexceptional. Indeed, a dictionary definition of "consent decree" is "[a] judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing." BLACK'S LAW DICTIONARY 410 (6th ed.1990). The legal significance of provisions such as ¶301 is the opposite of what the decision below implied: they do not preserve a basis for challenging a decree, but rather indicate defendants' assent to a court's award of relief, *as if* they were liable. *Compare Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.1991). Finally, the Fifth Circuit's (inconclusive) inquiry into the Attorney General's State law authority is precisely what *Lapides* indicated need not be pursued. *See* 535 U.S. at 622-23.

II. The Eleventh Amendment Provides No Basis For Recognizing A Category Of Federal Court Orders That Are "Valid" – But Not Enforceable

A. The Eleventh Amendment *Does Not* Divest A Federal Court Of "Inherent Jurisdiction" To Enforce Its Orders

But even if the Circuit Court's erroneous resolution of the waiver issue did not compel reversal, this Court's case law refutes the central premise of the decision below: that the Eleventh Amendment limits a federal court's jurisdiction over a proceeding seeking compliance with its decree. *See Gunter*.

"Courts by their creation [are] vested with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates," *Anderson v. Dunn*, 18 U.S. 204, 227 (1821); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled").

Consent decrees are "judicial acts" and must be obeyed as such, *Rufo*, 502 U.S. at 378; *United States v. Swift & Co.*, 286 U.S. 106, 116-17 (1932) ("*Swift II*") (consent decree, whether "right or wrong, became the judgment of the court"); *accord United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002) (consent decree, is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees"), *cert denied*, 538 U.S. __ (Apr. 21, 2003); *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986) ("The respect due the federal judgment is not lessened because the judgment was entered by consent").

Indeed, judicial enforceability is what distinguishes consent decrees from other forms of consensual resolution. *See Rufo*, 502 U.S. at 378 (a decree is "an agreement that the parties * *

* expect will be * * * * enforceable as [] a judicial decree"); *Kozlowski*, 871 F.2d at 245 ("The judicial aspect of a consent decree derives from the imprimatur of the court, which invests the decree with the integrity of the judiciary and signifies the court's willingness to implement the solution of the parties"); *see generally Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994) (if a court's order "incorporates the terms of the settlement agreement," a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist"); *cf. Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (plaintiff who obtains consent decree "prevails," for attorney's fee statute purposes, because of "entitle[ment] to enforce [it] * * * against the defendant").

The Fifth Circuit's error was in treating the enforcement stage as a "'different'" proceeding, 300 F.3d at 541 (quoting *Lelsz*) in which the jurisdiction of a federal court, upon finding its decree violated, extended no further than its power to compel official action "*in the absence of a decree*," *id.* at 542 (emphasis added).

But when an action seeks to enforce a "legal duty * * * which is required of [a defendant] * * * by virtue of the judgment [the plaintiff] has already obtained," *Labette County Comm'rs v. United States ex rel. Moulton*, 112 U.S. 217, 221 (1884), the proceeding is *not* "a new suit, in the jurisdictional sense," *Riggs v. Johnson County*, 73 U.S. 166, 198 (1867), but rather "a proceeding ancillary to the judgment which g[ave] the jurisdiction," *id.*; *accord Kokkonen*, 511 U.S. at 378 (contrasting a proceeding that "is more than just a continuation or renewal of the earlier proceeding," which would "require[] its own basis for jurisdiction"); *Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937) (a federal court's "jurisdiction to entertain" a bill "to effectuate its prior decree * * * follows that of the original suit").

These jurisdictional principles apply fully where State

officials are the parties bound by the decree. Thus, in *Gunter*, the Court expressly held that the Eleventh Amendment does not prevent "a court of the United States [from] administering relief * * * in a matter ancillary to a decree rendered in a cause over which it had jurisdiction," 200 U.S. at 292. Sustaining a federal court order prohibiting South Carolina officials from undertaking to collect a tax previously enjoined as unconstitutional, *Gunter* explained that "the right of the court to administer relief – to make its decree effective" is not "to be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain." 200 U.S. at 292; *see also Prout v. Starr*, 188 U.S. 537 (1903); *Woolworth*, 150 U.S. at 412 ("the bill, being ancillary to the original proceeding * * * can be maintained without reference to the citizenship or residence of the parties").[8]

This principle was reaffirmed in *Hutto v. Finney*, 437 U.S. 678 (1979), which sustained against Eleventh Amendment challenge an order requiring officials to pay State funds to the prisoner-plaintiffs, as a financial penalty for defendants' bad-faith failure to comply with a district court order. "Under *Ex parte Young* and *Edelman v. Jordan*," *Hutto* explained, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." 437 U.S. at 691. *See Reivitz*, 820 F.2d at 868

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[8]Absence of diverse citizenship, as in *Woolworth*, is a defect of federal subject matter jurisdiction – which, ordinarily, cannot be waived. *Compare Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 267 (1997) ("The [Eleventh] Amendment * * * enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"); *United States v. Cook County*, 167 F.3d 381, 388-89 (7th Cir. 1999) ("For most purposes it overstates the strength of sovereign immunity to analogize it to a lack of jurisdiction. Any difference between the two should make it easier to raise a jurisdictional objection belatedly than to raise a sovereign-immunity objection belatedly").

("Against a state that violates a valid federal court decree the court has the power to issue any order necessary to enforce the decree, including an order to pay").

While the outer limits of federal court enforcement jurisdiction may be "[im]precise," *Kokkonen*, 511 U.S. at 379, the order here, one "merely requir[ing] compliance with the existing judgment by the persons with authority to comply," *Peacock v. Thomas*, 516 U.S. 349, 358 (1996), arises from its undisputed core.[9] Indeed, the order, which only directs defendants to *propose a plan* of prospective compliance with existing decree provisions, raises far less substantial Eleventh Amendment concerns than did the decrees in *Hutto* or *Reivitz*. There is no conceivable danger here of a "large or * * * unexpected" monetary penalty, *Hutto*, 437 U.S. at 692 n.18, and there can be no contention that the relief ordered goes further than "necessary to enforce the court's prior orders," *id.*; *cf. Spallone v. United States*, 493 U.S. 265 (1989).[10]

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[9]Recent decisions rejecting novel theories of "ancillary jurisdiction" cast no doubt on *Gunter* or other precedents. On the contrary, those cases: concerned actions of federal courts which were conceded to have no other basis for subject matter jurisdiction, *see Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366 (2002); *Kokkonen*; involved assertions of different remedies, *see Peacock*, against different parties, *see id.*, whose relation to the underlying judgment was tangential; and were not necessary to preserving the federal court's authority, *see* 516 U.S. at 360.

[10]Indeed, while the Fifth Circuit treated federal courts' "inherent power" to enforce lawful decrees as entirely different from (and lesser than) the power recognized in *Ex Parte Young*, that understanding is itself problematic. Under the Constitution, valid federal court decrees are themselves Supreme law. *See Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 696 (1979); *see Badgley*, 800 F.2d at 38 ("When the defendants chose to consent to a judgment, * * * the result was a fully enforceable federal judgment that overrides any conflicting state law or state court order"); *see also Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996) ("[A] provision in a validly-entered consent decree is an obligation on State officials to conform their conduct to federal law").

B. The Fifth Circuit Rule Is Anomalous And Unfair

The proposition that a federal decree may be validly entered, but not be enforced, cuts against the grain of basic rule-of-law norms. *See Komyatti*, 96 F.3d at 962-3 (allowing officials to violate decrees is not "compatible with the traditions of our people and their commitment to a rule of law"). A doctrine that permitted (or required) district courts to enter agreements as ostensibly binding orders, but denied them power to compel compliance undermines the integrity of the judicial process. *Vecchione, v Wohlgemuth*, 558 F.2d 150, 158-9 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (if sovereign immunity could be raised after entry of judgment, the judgment would be a "mere advisory opinion"); *Cook County*, 167 F.3d at 386 (rule precluding federal government from raising sovereign immunity as a basis for a collateral attack "is essential if judgments are to resolve the parties' disputes, rather than just set the stage for the next act"); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff").[11]

Indeed, the Court has often stressed that even when a judicial decree is "subject to substantial constitutional question," disobedience is not an option. *Washington Fishing Vessel Assn.*, 443 U.S. at 696 (even where court orders are "erroneous in some respects, all parties have an unequivocal obligation to obey them while they remain in effect"); *see also*

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[11]As Judge Easterbrook explained in *Cook County*, allowing the United States to raise sovereign immunity in an attack on a judgment "would reduce to advisory status all decisions adverse to the financial interests of the United States,"167 F.3d at 386. *See id.* (describing such a regime as "unpalatable [and] likely * * * unconstitutional"). The conduct here goes considerably beyond litigating a case to final judgment, *see Cook County*: Respondent officials expressly requested that the court to "*order*" them to perform the obligations they now resist on immunity grounds.

Cooper v. Aaron, 358 U.S. 1, 18-19 (1958); *Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"); *Walker v. Birmingham*, 388 U.S. 307, 317 (1967).

As a practical matter, according officials who do not comply with decrees broad rights to object to the decrees in enforcement proceedings leaves them scant incentive to pursue lawful, but more cumbersome, means for obtaining relief from judgment. *See Rufo*, 502 U.S. at 383, 391 (imposing on party seeking Rule 60(b)(5) modification burden of (a) showing "a significant change in circumstances" and (b) proposing appropriately tailored modification); *Hook v Arizona Dep't of Corrections*, 972 F.2d 1012, 1017 (9th Cir. 1992) (rule forbidding State officials from raising Eleventh Amendment defense in enforcement proceeding "is supported by policies favoring the finality and binding effect of judgments and requiring the party seeking relief from a final judgment to bear the burden of modifying it").[12]

A rule that imposes stricter standards for a decree's enforcement than its entry suffers from two further defects. First, it operates with maximal unfairness to litigants, such as Petitioners, who, in exchange for defendants' undertaking limited, but judicially enforceable, obligations, forego other potentially meritorious claims. Even worse than a ruling declining to *enter* a decree at the inception – which leaves plaintiffs essentially in the position they occupied before pursuing settlement – a rule that makes decree provisions

[12]Although, in discussing its appellate jurisdiction, the decision below treated the district court's order as one "'refusing to dissolve or modify' an injunction," 300 F.3d at 537 (quoting 28 U.S.C.§1292(a)(1)), Respondents *did not* move to vacate or modify this decree.

unenforceable "allow[s] the [defendant official] to avoid * * * bargained-for obligations – while retaining the benefits of concessions he obtained on other issues during the negotiations." *Kozlowski,* 871 F.2d at 245.

Finally, the Fifth Circuit rule reverses what is an almost universal rule of judicial administration: that claims of error, if entertained at all, must meet increasingly stringent standards at successively later stages of the judicial process. Although not all objections are deemed forfeited by a party's failure to raise them at the earliest possible opportunity, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Hormel v. Helvering,* 312 U.S. 552 (1941), the distinction between an assertion of error on appeal and one that comes after final judgment is fundamental. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998) ("only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge").[13]

These principles apply with special force to consent decrees. Thus, *Swift I*, after contrasting English practice, under which "a consent decree could not be set aside by appeal * * * except in case of clerical error" with the more "liberal" American rule, where "lack of actual consent * * * fraud in its procurement," or lack of federal jurisdiction – but not "the merits of the cause" – "would also be considered," 276 U.S. at 323-24, indicated that where "the attack is not by appeal * * * but by a motion to vacate, filed more than four years after the entry of the decree, the scope of the inquiry may be even

[13]Although rules limiting collateral attacks do not apply as rigidly to equitable decrees with prospective force, such decrees are nonetheless entitled to respect as "final judgment[s]," *Rufo*, 502 U.S. at 391, and, far from permitting issues to be raised *more readily* on collateral challenge, *Rufo* makes clear that they "may be reopened *only to the extent that equity requires*," *id.* (emphasis added).

narrower," *id.* Here, Respondents did not move to vacate; they raised objections – to provisions they agreed to – as a defense to enforcement. *Cf. id.* at 327 (although alleged error concerning need for an injunction would "ordinarily [be] remediable on appeal. Such an error is waived by the consent to the decree").

III. The Appeals Court's Limitations On Enforceable Decrees Are Unwarranted

Nor can the Fifth Circuit's decision be sustained on the ground that the underlying decree was not "lawful," *Anderson*, 18 U.S. at 227, in the sense that its provisions exceeded a federal court's power to impose. As noted above, the appeals court's decision did not question that the decree provisions in this case (1) "served to resolve a dispute within the court's subject matter jurisdiction," (2) "came within the general scope of the case made by the pleadings," and (3) "furthered the objectives of the law upon which the complaint was based." *See Firefighters*, 478 U.S. at 525.

Rather, the court indicated that where State officials are defendants, a consent decree provision may be enforced only if two *additional* requirements are satisfied: (1) the obligation violated would be a requirement of federal *law* (absent the decree), and (2) the violation would be actionable under § 1983 as a deprivation of "federal *right*."

Although the Fifth Circuit linked these two requirements to the "jurisdictional" nature of the Eleventh Amendment (and the *Ex Parte Young* exception), limits it said apply "[r]egardless of what the parties agreed to in the consent decree," neither accurately describes a limitation on a court's power to enter a decree, let alone a valid basis for disallowing enforcement of provision against a party who urged its adoption.

A. State Officials May Undertake – And Federal Courts, Enforce – Obligations That Go Beyond Compliance With Federal Law

As an example of the first restriction, the decision below held that a decree provision requiring that defendants "'*effectively*' inform the class about EPSDT services," 300 F.3d at 546 (emphasis added), was unenforceable because the federal statute, 42 U.S.C. § 1396a(a)(43)(A), mandates "'informing all [eligible persons] of the availability of [EPSDT] services," – but *"does not expressly require 'effective' conveyance of information."* 300 F.3d at 546 (emphasis added).

This ruling reflects a misunderstanding of federal courts' equitable power. Even when State officials do not consent, courts may enjoin conduct that is not in itself unlawful. In such cases, a court order must "be related to," *Milliken v. Bradley*, 418 U.S. 717, 738 (1974), the federal law it enforces – as this decree provision undeniably is – but it need not be limited to "a directive to obey the [statute]," *Rufo*, 502 U.S. at 389. *See also FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978); *Swift*, 276 U.S. at 330.

And this Court's decision in *Rufo* – a case involving a consent decree to which a State official was a party, *see* 502 U.S. at 372 – establishes that federal court may enter a consent decree obliging an official to "not only do more than the Constitution itself requires * * * [but also] *more than what a court would have ordered absent the settlement.*" *Id.* at 389 (emphasis added). *See also Suter*, 503 U.S. at 354 n.6 (citing *Rufo*'s recognition that parties "may agree to provisions in a consent decree which exceed the requirements of federal law").

Informed by this understanding, *Rufo* announced principles to guide courts' response to post-decree developments that establish the lawfulness of conduct that a decree prohibits. *See* Fed. R. Civ. P. 60(b)(5). While a significant change may warrant modification of the decree, *Rufo* stressed, "[a] proposed modification should *not* strive to rewrite a consent decree *so*

that it conforms to the constitutional floor," 502 U.S. at 391 (emphasis added).[14]

Under the Fifth Circuit rule, the "constitutional [and statutory] floor" defines the outer limit of a *court's power* – even when State officials have not sought a modification, let alone carried their burden of showing that equity requires one.

B. The Fifth Circuit's Further Restriction, To Obligations To Which Plaintiffs Have a § 1983 Right, Is Wholly Unwarranted

The error of *further* limiting federal court decrees to those obligations to which a plaintiff is independently entitled as a matter of "federal right" *i.e,* that "would be remediable" under § 1983 " in the absence of the decree" is even more plain.

The only authority cited for that proposition, the Circuit's prior decision in *Lelsz*, does not support it. Although that decision used the phrase "federal right" as a limitation on the reach of a consent decree, it did so to emphasize the distinction between claims (and decree provisions) that had their *source* in *State*, rather than federal *law* – in the course of holding that only the latter were enforceable. *Lelsz* gave no indication that it was further incorporating the principle – significant in this Court's § 1983 jurisprudence – that violations of "federal law" are not necessarily deprivations of the personal "rights" for

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[14]In rejecting the government defendants' arguments for a less demanding modification standard, *Rufo* explained that such a rule "'would necessarily imply that the only *legally enforceable* obligation assumed by the state under [a] consent decree was that of ultimately achieving minimal constitutional * * * standards,'" 502 U.S. at 390 (quoting *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991) (emphasis in original)) – a proposition the decision treated as self-evidently erroneous.

Although *Rufo* involved a decree agreed to after a judicial finding of liability, *Lawyer v. United States Dep't of Justice*, 521 U.S. 567 (1997), makes plain that a consent decree's validity does not depend on a finding or admission of liability. *See also Maher v. Gagne*, 448 U.S. 122 (1980).

which § 1983 provides a cause of action.[15] *See, e.g., Golden State Transit*; *Dennis v. Higgins*, 498 U.S. 439 (1991).

This asserted, second limitation, like the first, cannot be squared with *Rufo*. To the extent that intervening judicial decisions had resolved that double-bunking was permissible under federal *law*, *see Bell v. Wolfish*, 441 U.S. 520 (1979), the detainee-plaintiffs in that case could not claim a *§ 1983 right* to single-selling. *See* 42 U.S.C. § 1983 (providing cause of action for "deprivation of any rights, privileges or immunities *secured by the Constitution and laws*") (emphasis added); *cf. Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (claimed violation of "clearly established" constitutional right is foreclosed when there is no "constitutional right at all").

And *Suter v. Artist M.* specifically explained that there was nothing inconsistent about a State official's entering into a consent decree (in a parallel proceeding) that obliged her to make "reasonable efforts" to maintain and reunify families, and her arguing – successfully – in this Court, that a statutory requirement to that effect, *see* 42 U.S.C. § 671(a)(15), was insufficiently definite to give rise to a § 1983 claim. Rather than requiring "'reasonable efforts,' with no further definition," *Suter* explained, *the decree* had included provisions "defin[ing] the standard against which those efforts are to be measured." 503 U.S. at 354 n.6.

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[15]The order sought to be enforced in *Lelsz* required State officials to comply with State law – and had been entered before this Court decided *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984). *Lelsz* noted that the situation would unlikely recur, because (1) officials would be aware that State-law based injunctions would be unavailable in litigated cases, 807 F.2d at 1254 and (2) courts, before entering future decrees, would assure themselves, as did the district court here, of their subject matter jurisdiction, *id.* at 1253 n.13. *Cf. Komyatti*, 96 F.3d at 961 (holding that no issue arises when State officials settle *federal* claims by promising to comply with State standards).

But even if these cases were not controlling, there is no principled basis for allowing an official whose conduct is violating federal *law* ***and*** a consent decree provision to defeat enforcement of that provision, on the ground that plaintiff could not establish a § 1983 "right" absent the decree.[16]

First, although the Fifth Circuit cited *Ex Parte Young* as supporting this further limitation, the "theory of *Young*" is that "remedies designed to end a continuing violation of *federal law* are necessary to vindicate the federal interest in assuring the supremacy of that law," *Green* 474 U.S. at 426 (emphasis added). Indeed, the opinion below elsewhere recognized that "[f]or purposes of the Supremacy Clause and *Ex Parte Young*, the mandates set out in Medicaid statute are * ** federal law," 300 F.3d at 550.

Consistently with these principles, this Court has repeatedly sustained judgments in cases compelling State officials' prospective compliance with federal law – without inquiring whether plaintiffs had a statutory cause of action (and under circumstances where precedent indicates that a § 1983 claim would not lie). *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000) (claim that state statute "unconstitutionally infringed the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by [a] federal Act"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992) (claim that state

[16]To the extent that the appeals court's decision is understood to mean that a motion to enforce a court order requires a statutory cause of action, it suffers from the defect discussed *supra*: treating a proceeding seeking compliance with a judgment (in a case where the court has expressly retained jurisdiction) as if it were a new suit. As the precedents cited above make plain, a motion to enforce is, in substance, indistinguishable from an "[equitable] bill ancillary to an original case or proceeding," *Local Loan Co.*, 292 U.S. at 239. *See* Fed. R. Civ. P. 2; *see also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280 (D.C. Cir. 1993) (explaining that decree enforcement proceedings are governed by contract law principles).

regulation was preempted by federal statute); *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983); *see generally Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645-46 (2002) (noting Court's long record of entertaining "injunction suits against state regulatory commissioners").

Whether these cases establish that "the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws," *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (citation omitted), or that plaintiffs may "seek[] declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting), they at least confirm that the existence *vel non* of a § 1983 cause of action does not go to a court's power. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994); *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). *See generally Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting), (explaining that prospective relief is available without regard to whether plaintiff "can show *the deprivation of a right, privilege, or immunity secured by federal law*") (emphasis added).[17]

To the extent that the Fifth Circuit held that a district court is required to determine, before enforcing a decree, whether plaintiffs would have been able to establish a statutory entitlement to relief had the case been litigated to completion,

[17]*Cf. Antrican v. Odom*, 290 F.3d 178, 191(4th Cir. 2002) (declining to consider § 1983 issues raised on interlocutory appeal because they were "not 'inextricably intertwined' with North Carolina's Eleventh Amendment immunity claim, nor [was their consideration]'necessary to ensure meaningful review of the * * * immunity question.'") (citations omitted).

rather than settled, that is precisely the sort of question that precedent teaches should not be asked. *See Rufo*, 502 U.S. at 391-92 (a "court should not 'turn aside to inquire whether some of [the provisions of the decree] * * * could have been opposed with success if the defendants had offered opposition'") (quoting *Swift*, 286 U.S. at 116-17).

Indeed, while consent decrees, like other prospective equitable judgments, may be reopened "to the extent that equity requires," 502 U.S. at 391, they are otherwise "subject to the rules generally applicable to other * * * decrees," meaning that objections that do not go to a court's power to render judgment may not be raised as an excuse for noncompliance with an (unmodified) final judgment. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976) ("outstanding injunctive orders of courts [must] be obeyed until modified or reversed by a court having the authority to do so"). The Fifth Circuit rule, which treats the cause of action question as one that must be adjudicated in plaintiff's favor before a party bound by the judgment may be compelled to comply, respects none of these principles.[18]

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[18]It bears emphasis that the Fifth Circuit treated its rules as governing "[r]egardless of what the parties agreed to in the consent decree," 300 F.3d at 542. Thus, State officials are *without power* to waive the objection that a plaintiff does not have a § 1983 cause of action – even in a case where prospective compliance with federal law is all that is sought. That rule is facially incompatible with *Suter*, *see supra*, which recognized that an official could waive a valid § 1983 defense, and imposes a more stringent rule than *Clark v. Bernard*, which establishes that "sovereign immunity is 'a personal privilege which [a State] may waive at pleasure,'" 108 U.S. at 447.

Indeed, while the Court has treated Sovereign immunity defenses somewhat differently than other objections – allowing them to be raised for the first time on appeal, *see Edelman*, 415 U.S. at 678 – the costs of even that limited exception have been acknowledged, *see Schacht*, 524 U.S. at 395 (Kennedy, J., concurring); *Ku v. Tennessee*, 332 F.3d 431 (6th Cir. 2003), and there is no precedent for allowing an objection (such as a § 1983 defense) that does not sound in sovereign immunity, let alone subject matter

IV. The Fifth Circuit's Rules Would Seriously And Unnecessarily Undermine Important Public Interests

A. The Decision Makes Settlements With State Officials A Practical Impossibility

Palpable unfairness to parties to existing consent decrees and incompatibility with orderly judicial process, *see supra*, are not the only demerits of the rules announced below. It is hard to imagine a more potent "disincentive to settle institutional reform litigation," *Rufo*, 503 U.S. at 389, than the legal regime established in the Fifth Circuit's decision.

It is axiomatic that parties' willingness to enter agreements will be affected by courts' readiness to enforce them, *see* A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW 4 (1979); *United States v. ITT Continental Baking*, 420 U.S. 223, 235-37 (1975) (consent decrees have "attributes of both contracts and of judicial decrees"), and this Court has recognized that the reasons why "consent decrees have become widely used as devices to facilitate settlement," *Firefighters*, 478 U.S. at 523 n.13, relate primarily to enforcement advantages, *see id.* (cataloguing advantages of decrees, relative to contractual settlements).

But the rule announced by the Fifth Circuit is especially drastic. If federal courts, confronting violations of consent decree provisions, were limited to enjoining actions that would be unlawful "in the *absence* of a decree,"300 F.3d at 537, plaintiffs who negotiate decrees will essentially be "giv[ing] up *something* they might have won had they proceeded with the litigation," *United States v. Armour*, 402 U.S., 673, 681-82 (1971) (emphasis added) – in exchange for nothing.

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jurisdiction, *see Cook County*, to be raised as a defense to non-compliance. *Cf. Hutto*, 437 U.S. at 696 ("A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant'") (quoting *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 77 (1927)).

The disadvantages of this regime would not be borne exclusively by federal court *plaintiffs*. As *Armour* and *Rufo* acknowledge, settlements of cases like this one can equally "serve the interests of defendants," *Evans v Jeff D.*, 475 U.S. 717, 733 (1986) (quoting *Marek v Chesny*, 473 U.S. 1, 10 (1985).

As noted above, the Fifth Circuit decision can be read to impose limitations that apply "regardless of what the parties agree to" – meaning that *defendants* have little power to waive defenses or enter decrees. *Cf. Montgomery v. Maryland*, 266 F.3d 334, 337 (4th Cir. 2001) (respect for State sovereignty "is undermined when a federal court imposes on a state a legal argument that the state * * * affirmatively withdrew"), *cert. granted and judgment vacated on other grounds*, 535 U.S. 1075 (2002). But even if that implication could safely be ignored, there can be no doubt that, as a practical matter, a rule that offers plaintiffs no incentive to settle will operate to constrict the options available to State officials.

A regime that effectively requires adversary adjudication in every case limits defendants' ability to determine that particular cases are not worth the "time, expense, and inevitable risk of litigat[ing]," *Armour*, 402 U.S. at 681, and there are strong reason to expect that a "compromise" that is "carefully negotiated" by the parties, *id.*, will be more reflective of and sensitive to State policy priorities than would be an injunction imposed at the end of litigation.

Finally, the benefits of consensual resolution of disputes like this one extend beyond the parties before the court. Longstanding policies favor "[s]ettlements of matters in litigation, or in dispute, without recourse to litigation," *St. Louis Min. & Mill. Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898); *Marek*, 473 U.S. at 5; *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts"); *see also* Fed. R. Civ. P. 16(a)(5); Fed.

R. Civ. P. 16(c)(7); Fed. R. Civ. P. 68. Not only are judicial and litigation resources channeled toward disputes for which there is no mutually acceptable resolution, but State residents can expect that solutions arrived at cooperatively will "promise[] to *work*" more effectively and more quickly, *see Griffin v. Prince Edward County Sch. Bd.*, 377 U.S. 218, 234 (1964), than those reached after protracted or rancorous adversarial proceedings.[19]

B. The Fifth Circuit's Rules Are Not Necessary To Protect Any *Legitimate* State Interest

Although the decision below undeniably enabled Respondents to avoid unwanted obligations, it should be clear that no novel rules are needed to protect *legitimate* State interests. *Cf. Lapides*, 535 U.S. at 620 (noting that "State's actual preference * * * might * * * favor selective use of 'immunity' to achieve litigation advantages"). Rather, settled principles governing consent decree entry and enforcement afford officials ample protection against uninvited court intrusion and inequitable decrees.

Officials are "under no compulsion," *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring), to agree to settlements; to make them enforceable in federal court, *see Firefighters*, 478 U.S. at 523 ("the choice of an enforcement scheme – whether to rely on contractual remedies or to have an agreement entered as a consent decree – is itself made voluntarily by the parties"); *Kokkonen*, or to enter into them before disputed legal or factual

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[19] *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 899 ("A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court"); *see also Komyatti*, 96 F.3d at 961.

issues are determined. *Cf. Jeff D.*, 475 U.S. at 727 ("The options available to the District Court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case"). Moreover, defendants may enter decrees that preserve the right to appeal, *Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.1991); *United States v. $92,422.57*, 307 F.3d 137 (3rd Cir. 2002); *cf.* Fed. R. Crim P. 11(a)(2).

Finally, even after officials give their consent to a judgment, there is "no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen," *Railway Employees v. Wright*, 364 U.S. 642 (1961). And in considering modifications, *see Rufo*, 502 U.S. at 392 – and even in enforcing decrees against recalcitrant defendants, *Spallone*; *Hutto* – federal courts are obliged to show special respect for State prerogatives.

In view of the legal rules already in place, the effects of the Fifth Circuit rule are uniformly undesirable: relieving defendants of freely undertaken obligations that they *could not* show to be inequitable (and permitting them this relief, despite their having disobeyed a decree), depriving plaintiffs of bargained-for remedies, relegating courts to "hoping" for compliance with their decrees, and disabling parties – plaintiffs and officials alike – who might otherwise be able to resolve disputes consensually from being able to do so.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Descriptions of *Amici Curiae*

AARP is a nonpartisan, nonprofit membership organization for people 50 and over, with 35 million members, of which 45% are working. We provide information and resources and advocate on legislation, consumer and legal issues for our members and other citizens, including low-income Medicaid beneficiaries such as those represented by appellants. Some AARP members are themselves beneficiaries of Medicaid, and their interests are directly jeopardized by the Fifth Circuit's decision. Over the years AARP has supported legislative amendments to Medicaid and other government programs, based upon the belief that its members and other citizens have both enforceable rights and access to the courts to present their claims for redress of violations of those rights. AARP has also participated in numerous court cases supporting Medicaid beneficiaries whose claims are based on legal principles disregarded by the Fifth Circuit.

The American Association of People with Disabilities (AAPD) is a national non-profit membership organization of children and adults with disabilities, their family members, and their supporters. AAPD's mission is to promote political and economic empowerment of the more than 56 million Americans with disabilities. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act, and works to ensure effective enforcement and implementation of civil rights laws and other laws affecting individuals with disabilities.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with affiliates or chapters in every state, and approximately 400,000 members dedicated to preserving the principles of liber', and equality

embodied in the Constitution and this Nation's civil rights laws. Since its founding in 1920, the ACLU has maintained an active docket of federal court litigation as one means of achieving its civil liberties goals. Today, the ACLU and its affiliates are participants in literally scores of consent decrees around the country involving such disparate issues as education, foster care, police misconduct, voting rights, and prison conditions. The ability to enforce current and future consent decrees against state defendants is therefore a matter of substantial importance to the ACLU and its clients.

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection. In particular, ADL has supported Congress's broad authority under the Fourteenth Amendment enforcement power to remedy constitutional deprivations caused by States, and Congress's authority to abrogate state sovereign immunity in cases of clear civil rights violations.

The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to

advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. The Center has successfully resolved much of its litigation through the use of consent decrees with state officials, and enforcement of these decrees has been pivotal to achieving compliance with legal mandates and improving the lives of individuals with mental disabilities. See, e.g. *Wyatt v. Sawyer* (M.D. Ala) (class action raising constitutional and statutory challenges to conditions, policies and practices in Alabama's mental health and mental retardation facilities); *R.C. v. Nachman*, (M.D. Ala.) (class action raising constitutional and statutory challenges to deficiencies in child welfare system in Alabama); *New York State Assn for Retarded Children, Inc. v. Carey* (E.D.N.Y.) (class action challenging conditions at Willowbrook Developmental Center).

Children's Rights is a national nonprofit organization whose mission is to achieve reform in this nation's child welfare systems on behalf of abused and neglected children. For over thirty years, starting as the Children's Rights Project of the American Civil Liberties Union, and since 1995 as an independent organization, Children's Rights has championed the legal rights of children involved with child welfare systems through research, education and class-action litigation to improve government performance and accountability, and ensure better outcomes for those children. Children's Rights most often achieves the reforms it seeks by entering into negotiated federal consent decrees with government officials and then seeking enforcement of those decrees as necessary. Children's Rights is currently monitoring compliance with five federal consent decrees requiring State reforms - *Jeanine B. v. McCallum* (E.D. Wis. 2002); *Brian A. v. Sundquist* (D. Tenn.

2001); *G.L. v. Stangler* (W.D. Mo. 2001); *Joseph A. v. Ingram* (D.N.M. 1998); *Juan F. v. Roland* (D. Conn. 1991) - and has three other federal suits in active litigation, one of which is in settlement negotiations with state officials in New Jersey, *Charlie and Nadine H. v. McGreevey* (D.N.J.).

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because many P&As are involved in the ongoing enforcement of consent decrees, which significantly impact the lives of hundreds of their clients.

The National Health Law Program (NHeLP) is a non-profit law firm that represents people who cannot afford the high cost of health care. This includes representing working poor people, people with disabilities, and children in actions to obtain access to needed health care services. As such, NHeLP works extensively with the Medicaid program. In just the last five years, NHeLP has represented Medicaid beneficiaries in a number of federal court cases, including in Maine (*Risinger v. Concannon*), Louisiana (*Chisholm v. Hood*), and West Virginia (*Benjamin H.v. Ohl*). In each of these actions, the plaintiffs' complaint asked the court to order injunctive relief requiring the state Medicaid officials to comply prospectively with specific

provisions of the Medicaid Act. Rather than engage in lengthy and costly litigation of the issues, the parties mutually agreed to enter into consent orders that set forth specific actions the state officials would take to bring the Medicaid program into compliance with the federal law. NHeLP has a significant interest in the case before the Court. The ruling in this case will affect the clients in these cases, and it will influence our future representation of individuals who are being harmed by ongoing state violations of federal laws.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that, for over thirty years, has used the power of law to define and defend women's rights. As part of its efforts to achieve gender equality, NOW Legal Defense has participated in a number of lawsuits against government officials alleging violations of federal law that were resolved through consent decrees. NOW Legal Defense has an interest in ensuring the enforceability of those decrees and in preserving its ability to resolve ongoing and future lawsuits against government officials consensually. In addition, a major goal of NOW Legal Defense is to ensure full compliance with federal civil rights laws, including by state government entities. In support of that goal, NOW Legal Defense has frequently appeared as counsel and as *amicus* before this Court. The Fifth Circuit's decision in this case, if allowed to stand, would seriously undermine that goal.

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In The Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, ET AL.,

Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATES OF UTAH, COLORADO, DELAWARE, HAWAII, IDAHO, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, VERMONT, WISCONSIN, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. STATE OFFICIALS DO NOT WAIVE THE STATE'S ELEVENTH AMENDMENT IMMUNITY BY ENTERING A CONSENT DECREE, NOR DOES ENTRY INTO A CONSENT DECREE ENLARGE THE JURISDICTION OF FEDERAL DISTRICT COURTS	3
A. Entry Into A Consent Decree Pursuant To *Ex Parte Young* Does Not Waive Eleventh Amendment Immunity	3
B. The *Ex Parte Young* Doctrine Limits Federal Courts To Enforcing Federal Law	5
C. Entry Into A Consent Decree By State Officials Sued Pursuant To The Doctrine Of *Ex Parte Young* Does Not Enlarge The Jurisdiction Of Federal Courts	7
D. *Rufo v. Inmates Of Suffolk County Jail* Did Not Change The Constitutional Limits Of *Ex Parte Young, Pennhurst*, And *Rizzo* As They Apply To Suits Brought Against State Officials	8

TABLE OF CONTENTS – Continued

Page

II. THE FIFTH CIRCUIT'S RULING ON ENFORCEMENT PROCEEDINGS IS JUSTIFIED NOT ONLY BY THE LEGAL PRINCIPLES IN *EX PARTE YOUNG*, BUT ALSO BY THE PECULIAR NATURE OF INSTITUTIONAL REFORM LITIGATION CONSENT DECREES..... 11

A. As A Practical Matter, State Officials Often Have Little Choice But To Enter Into A Consent Decree When Faced With Protracted, Costly Litigation On Emotionally-Charged, Highly-Politicized Issues..... 13

B. The Assumption That State Official Defendants Fully Control Compliance With All Terms Of A Consent Decree Is Misguided... 15

III. THE FIFTH CIRCUIT'S APPROACH REMEDIES MANY OF THE CURRENT PROBLEMS PARTIES AND COURTS FACE WITH ENFORCING DECREES..... 17

A. Consent Decrees Should Not Be Enforced So As To Bind State Officials' Successors In Office..... 17

B. Modification Has Proven An Ineffective Tool For Relieving The Problems States Face In Attempting To Comply With Consent Decrees..... 22

IV. ALLOWING ENFORCEMENT OF A CONSENT DECREE ONLY AFTER A SHOWING OF AN ONGOING FEDERAL RIGHT VIOLATION IS A GOOD RESOLUTION FOR BOTH SIDES, AND WILL GIVE COURTS CLEAR GUIDANCE ON HOW TO APPROACH ENFORCEMENT ACTIONS 24

TABLE OF CONTENTS – Continued

Page

A. Adopting The Fifth Circuit Rule Will Not Spell The End Of Consent Decrees..... 24

B. Overturning The Fifth Circuit Ruling Will Make State Officials Less Willing To Enter Into Consent Decrees..... 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Boyd v. Alabama, 94 U.S. 645 (1876) 19

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) 25

Butler v. Commonwealth of Pennsylvania, 51 U.S. (10 How.) 402 (1850) 19

Cooper v. Noble, 33 F.3d 540 (5th Cir. 1994) 22, 23

Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) 12

Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993) (en banc) 12, 21, 25, 27

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Gardner v. New Jersey, 329 U.S. 565 (1947) 4

Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944) 4

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 4, 5

John B. v. Menke, 176 F. Supp. 2d 786 (M.D. Tenn. 2001) 23, 24

Lapides v. Board of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002) 4

Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 7, 8, 9, 19

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) ..... *passim*

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TABLE OF AUTHORITIES – Continued

Page

Stone v. Mississippi, 101 U.S. 814 (1879) 18

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 18

United States v. Bd. of Educ. of City of Chicago, 799 F.2d 281 (7th Cir. 1986) 12, 16

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 19

Verizon Md., Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635 (2002) 5

West River Bridge Co. v. Dix, 47 U.S. (1 How.) 507 (1848) 19

Wyatt By and Through Rawlins v. Sawyer, 105 F. Supp. 2d 1234 (M.D. Ala. 2000) 12

CONSTITUTIONS

U.S. Const. Art. I, § 10 18

STATUTES

42 U.S.C. § 1973l(e) 25

42 U.S.C. § 1988 25

42 U.S.C. § 2000e-5(k) 25

OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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Judith Resnik, *Judging Consent*, 1987 U. of Chic. Legal F. 43 (1987) 14

Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977) 11, 15

Thomas M. Mengler, *Consent Decree Paradigms: Models without Meaning*, 29 B.C. L. Rev. 291 (1988) 14

INTEREST OF *AMICI*

Amici Curiae are States who have been or currently are parties to consent decrees. The *Amici* States have an interest in ensuring that the Eleventh Amendment guarantee of state sovereignty is consistently and appropriately enforced. The *Amici* States accordingly have an interest both in ensuring sovereign immunity is not presumed to be waived when a state official enters into a consent decree and that the jurisdiction of federal courts is not overstepped when consent decrees are enforced. The *Amici* States have the experience and history to provide the Court with information to help the Court understand the practical problems states face in attempting to comply with consent decrees their state officials have entered. In supporting Respondents, the State *Amici* intend not merely to echo the legal arguments Respondents make, but rather seek to provide the Court with a broader perspective of the implications of its decision on the states and their institutions.

SUMMARY OF ARGUMENT

This Court granted certiorari to address, in part, whether the law requires plaintiffs who bring an enforcement action to show an on-going violation of federal rights. The effect of this decision will be to decide if state officials who have entered into a consent decree in institutional reform litigation must comply with every provision of the decree – even if plaintiffs can no longer show an ongoing constitutional violation and even if violation of the provision does not violate a federal right. State *Amici* join the Respondents in urging the Court to determine that the law does not impose such a requirement on state officials. In

joining Respondents, State *Amici* first address the legal foundation of federal courts' jurisdiction over states and state officials: the *Ex parte Young* doctrine. The "legal fiction" of *Ex parte Young*, 209 U.S. 123 (1908), allows federal courts to exercise jurisdiction over state officials – who are otherwise immune from being sued in federal court – only to halt on-going federal rights violations and only so long as the remedy is limited to prospective injunctive relief which will prevent future violations. This fiction is dissolved when federal courts enforce consent decree provisions that do not directly bear upon federal rights violations.

This basic legal premise is presented against the backdrop of a broader discussion of the problems states face in attempting to comply with consent decrees entered into pursuant to *Ex parte Young*. State officials frequently have little choice but to enter into a decree when faced with litigation alleging federal violations. The decrees themselves are typically complex and detailed, aiming to eliminate problems that bureaucrats have struggled with for years. Full compliance with all decree provisions is extremely difficult for officials to achieve for many reasons. Third parties may fail to cooperate. Budget shortfalls may impede progress. And even if every provision is achieved, there is no guarantee that alleged violations will be remedied.

While states struggle, often for decades, to comply with consent decrees, state governments begin to lose their ability to function democratically. That is, policy choices and budget decisions are frozen until every provision of a decree is complied with. Newly-elected or appointed officials and state legislatures lose their ability to make changes as a changing electorate and economy dictate. In such cases, federal courts, rather than state officials,

essentially run major state institutions. The *Ex parte Young* doctrine was created to prevent this very spectacle of federal courts dictating how states run their agencies. Only when officials are violating citizens' federally secured rights may federal courts order state officials to act. Upholding the Fifth Circuit's ruling will ensure that federal courts direct state action only when there is federal violation and only so long as necessary to prevent future violations.

ARGUMENT

I. STATE OFFICIALS DO NOT WAIVE THE STATE'S ELEVENTH AMENDMENT IMMUNITY BY ENTERING A CONSENT DECREE, NOR DOES ENTRY INTO A CONSENT DECREE ENLARGE THE JURISDICTION OF FEDERAL DISTRICT COURTS.

A. Entry Into A Consent Decree Pursuant to *Ex Parte Young* Does Not Waive Eleventh Amendment Immunity.

Plaintiffs who bring suit against state officials seeking prospective, injunctive relief for alleged violations of federal rights – rights created under the federal constitution or federal law – do so pursuant to the *Ex parte Young* doctrine. *Ex parte Young* confirms the supremacy of federal law and provides a vehicle for vindicating federal rights without impugning state sovereignty. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). A suit brought pursuant to *Ex parte Young* thus avoids Eleventh Amendment and other sovereign immunities. *Ex parte Young*, 209 U.S. at 159-60. This is because the action is brought against state officials, not against the state or

its entities. *Id.*; *Pennhurst*, 465 U.S. at 100-103. A suit properly brought under *Ex parte Young* must allege an ongoing violation of federal law and must seek only prospective injunctive relief. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring).

When state officials enter into a consent decree to settle a case brought under *Ex parte Young*, there is no basis for a court to presume a waiver of Eleventh Amendment immunity. Such a waiver may be found only when state actors remove a case to federal court, after having waived immunity in state court, *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 623-24 (2002), when the state itself voluntarily appears in federal court, *see Gardner v. New Jersey*, 329 U.S. 565, 572-73 (1947), or when the state's consent to suit is unequivocally asserted in an express declaration of waiver made by the state. *Pennhurst*, 465 U.S. at 99; *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). When a state official enters a consent decree, waiver of sovereign immunity cannot be presumed because the suit is proceeding under *Ex parte Young* and because the state is not a party. For an official to waive the state's immunity, he or she must have actual authority to make the waiver. If the official does have such authority, there must nonetheless be an express waiver in the decree, such as "The State hereby waives its right to assert sovereign immunity as a challenge to the District Court's authority to enter or enforce this Decree." Absent such an express statement and authority to make the waiver, a state official does not waive the State's Eleventh Amendment immunity simply by entering into the decree. State officials thus must be free to assert the state's sovereign immunity if, later, plaintiffs seek through

enforcement actions to reach beyond the *Ex parte Young* fiction. *See Pennhurst*, 465 U.S. at 102-03 ("[T]he Eleventh Amendment bars some forms of injunctive relief against state officials. . . . ") (citing *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974)).[1]

B. The *Ex Parte Young* Doctrine Limits Federal Courts To Enforcing Federal Law.

The Constitution limits jurisdiction of federal courts over claims not based on federal law. In *Pennhurst*, the Court held that state officials may not be sued in federal courts for violations of state law. 465 U.S. at 106. Plaintiffs wishing to enforce state-created rights may not do so in federal courts. That is because when the rights sued upon are grounded in state law, the *Ex parte Young* rationale – which vindicates federal rights and the supremacy of federal law – is absent and the state's sovereign interest becomes predominant once again. *Id.* at 120 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the states. *Coeur d'Alene*, 521 U.S. at 267-68. *Ex parte Young*'s requirement – that plaintiff alleges an ongoing violation of federal law and requests prospective injunctive relief – is necessary. "Were it otherwise, the Eleventh Amendment, and not *Ex parte Young* would become the legal fiction." *Verizon Md., Inc. v. Public*

[1] The distinction made by State *Amici* that the actions of state officials sued pursuant to *Ex parte Young* do not bind the state *qua* state is critical, because often courts and parties discussing state official defendants will use the shorthand "state defendants" or "states," thus blurring the critical distinction.

Serv. Comm'n of Md., 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). This is especially problematic in institutional reform litigation consent decrees, which invariably include ambitious reform measures that are not based in federal or state law. *See infra*, Part III.

The *Pennhurst* Court recognized the "'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.'" *Pennhurst*, 465 U.S. at 104 n.13 (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976)) (quotation omitted). Because litigation over enforcement of consent decrees almost always involves issues of how a state must run its agencies beyond taking measures that directly bear upon federal rights, *Pennhurst* is especially germane.

Similarly, in *Rizzo*, the Court limited injunctive enforcement of federal law when that enforcement hampered city officials' ability to exercise the discretionary authority vested in them by state and local law. 423 U.S. at 378-81. The Court found that the plaintiff in *Rizzo* failed to establish the named defendants had violated federal law, *id.* at 376-77, and went on to conclude that the injunction was inconsistent with the doctrine of equitable restraint. *Id.* at 378-80. The Court concluded that "important considerations of federalism" weighed against the injunction. *Id.* at 378.

These cases illustrate this Court's willingness to strike down relief ordered pursuant to *Ex parte Young* when that relief exceeds the carefully drawn boundaries of federal courts' authority over local and state government. The same limitations should apply to enforcement of consent decrees against state officials since those decrees are entirely premised on *Ex parte Young*.

C. Entry Into A Consent Decree By State Officials Sued Pursuant To The Doctrine Of *Ex Parte Young* Does Not Enlarge The Jurisdiction Of Federal Courts.

Petitioners and their *Amici* argue that because federal courts may enter a consent decree that requires state officials to do more than federal law requires, courts must also be able to enforce those decrees.[2] They rely principally on *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), in which the Court held that "a federal court is not necessarily barred from *entering* a consent decree merely because the decree provides broader relief than the court could have awarded after trial." *Id.* at 525 (emphasis added). The assumption that entry of a consent decree necessarily grants power to enforce all provisions of the decree is erroneous. The *Firefighters* Court made it clear that just because a decree could be validly entered did not mean that the decree provisions were insulated from later legal challenge: "The fact that the parties have assented to the relief contained in a decree *does not render their actions immune from attack*." *Id.* at 526 (emphasis added).

Reliance on *Firefighters* for the proposition that federal courts can enforce any and all consent decree provisions in an *Ex parte Young* suit is also misplaced because the case is distinguishable from the present case. Although a consent decree case, *Firefighters* was a suit against a city and municipal officials pursuant to Title VII

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[2] State *Amici* do not address Petitioner's argument that the District Court in the present case could properly enter the consent decree, which has been addressed in Respondents' opposition brief.

of the Civil Rights Act. *Id.* at 504. It did not involve state officials and did not implicate *Ex parte Young*, *Pennhurst*, or the Eleventh Amendment. In *Firefighters*, the Court concluded that the consent decree did not violate the limits placed by Title VII on the remedial authority of a federal court. *Id.* at 526. In contrast, when enforcement of a consent decree *would* defy the law upon which the case is brought – in this case by violating the *Ex parte Young* doctrine – the federal District Courts must be barred from enforcing the offending provisions.

D. *Rufo v. Inmates Of Suffolk County Jail* Did Not Change The Constitutional Limits Of *Ex Parte Young*, *Pennhurst*, And *Rizzo* As They Apply To Suits Brought Against State Officials.

Petitioners and their *Amici* also rely on *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Significantly, unlike the unlitigated consent decree in the instant case, the consent decree in *Rufo* was negotiated and entered into only after a lengthy trial and findings by the District Court that defendants' actions violated the Fourteenth Amendment. *Id.* at 372-73. *Rufo* also involved injunctive relief against a county, not state officials.[3] The consent decree in *Rufo* was entered into only after bitter litigation, including two appeals of collateral orders to the First Circuit, during which the Court of Appeals reaffirmed the finding of ongoing constitutional violations. *Id.*

[3] In *Rufo*, the one state official defendant did not appeal the District Court's decision holding he was a proper party. *Rufo*, 502 U.S. at 373 n.2.

at 373 n.2, 374. The defendants sought to modify the decree, which was a very specific agreement aimed at correcting established, ongoing constitutional violations. *See id.* at 376. When the lower courts refused modification of the consent decree, this Court reversed, and clarified the standard for modification. *Rufo*, which merely clarifies modification, cannot control a question of enforcement of a consent decree entered without a finding of a constitutional or statutory violation and involving state officials sued pursuant to *Ex parte Young*.

Notably, the *Rufo* Court twice observed that constitutional violations had been found. *Id.* at 389. The Court's further discussion, concerning the decree obligations assumed by the defendants, must be read in the context provided by the Court. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements. . . . " *Id.* at 389. This portion of *Rufo* addresses whether a change in law would open the door to relitigate the prior finding of unconstitutionality underpinning the consent decree. It does not bear upon whether enforcement of a provision of an unlitigated consent decree can be challenged in a later enforcement proceeding.

The *Rufo* Court concluded by noting that, "accordingly, the District Court did not abuse its discretion in *entering* the agreed-upon decree, which clearly was related to the conditions found to offend the Constitution." *Id.* at 389 (emphasis added). Like *Firefighters*, *Rufo* commented on the District Court's ability to *enter*, not *enforce* consent decrees.

Because of the nature of institutional reform litigation, and the issues addressed in pre-litigation consent decrees entered into between plaintiffs and state officials, it is likely that some of the provisions of the consent decrees will reach beyond the limits of *Ex parte Young*, *Pennhurst*, and *Rizzo*. As Justice White observed in *Rufo*, "almost any affirmative decree beyond a directive to obey the Constitution necessarily does that." *Id.* at 389. Plaintiffs in consent decrees, like Petitioners in the instant case, might find themselves with an unenforceable decree provision, not founded on federal law, unless they can show an ongoing federal right violation. Petitioners argue such a result – having an unenforceable consent decree provision – would be intolerable. On the contrary, what would be intolerable would be to ignore the important constitutional limits of *Ex parte Young, Pennhurst*, and *Rizzo*.

Moreover, plaintiffs in consent decrees will not be the first to find themselves with a legally unenforceable claim. This was precisely the situation of the plaintiff in the case which gave shape to Article III of the Constitution and confirmed the principle of judicial review, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). While recognizing that Mr. Marbury was entitled to his political appointment, this Court concluded it could not grant a remedy because it lacked jurisdiction. *Id.* at 168, 175-80. *Amici* States ask this Court to reaffirm the important constitutional principles articulated in *Ex parte Young, Pennhurst, Rizzo*, and *Marbury*.

II. THE FIFTH CIRCUIT'S RULING ON ENFORCEMENT PROCEEDINGS IS JUSTIFIED NOT ONLY BY THE LEGAL PRINCIPLES IN *EX PARTE YOUNG*, BUT ALSO BY THE PECULIAR NATURE OF INSTITUTIONAL REFORM LITIGATION CONSENT DECREES.

Plaintiffs bringing suit against state officials for prospective, injunctive relief pursuant to *Ex parte Young*, do so to impact a variety of state-run institutions, including schools, prisons, and human service agencies. Frequently, whether the state agency is actually violating a federal right – either based in a federal statute or in the Constitution – is difficult to determine, and there is a wide range of policy alternatives that might eliminate the problems alleged in the initial complaint. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 438 (1977) (discussing this problem in the context of mental health law). Once suit is brought, however, debate over the proper policy choice to ameliorate problems in a state institution shifts from the political arena to the courts. This shifting of policymaking from the public, political arena to the courts is one of the most salient, and most troubling, features of institutional reform litigation. *See* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265, 1267 (1983).

Institutional reform consent decrees are also marked by their complexity and long duration. *Id.* The decrees typically contain a host of highly detailed requirements. *Id.* The specific provisions are usually "extensive . . . in their commands," prescribing not only "one or two acts, but a whole course of conduct." *Id.* Because of their complexity, institutional reform decrees are often difficult to

implement and interpret. *See, e.g., United States v. Bd. of Educ. of City of Chicago*, 799 F.2d 281, 283 (7th Cir. 1986) (observing that a decree mandating a school desegregation program was "fraught with problems of interpretation and implementation" throughout its (then) six-year history). Moreover, because their provisions require complex remedial action, "[institutional reform] decrees often remain in place for extended periods of time." *Rufo,* 502 U.S. at 380. In fact, a sampling of consent decrees currently in force reveals decrees that have spanned up to 30 years. *See* Appendix A. Further, because decrees of long duration are more likely to face "significant changes," *Rufo*, 520 U.S. at 380, the potential for conflicts between the parties to a decree often increases the longer the decree remains in place. In fact, unlike typical settlement agreements, consent decrees entered into in an effort to settle institutional reform suits often mark the beginning, not the end, of protracted litigation. *See, e.g., Evans v. City of Chicago*, 10 F.3d 474, 482 (7th Cir. 1993) (en banc) (plurality opinion) ("Attempts to enforce this consent decree have not produced the peace that settlement brings. There have been 16 years of noisome litigation."); *Dixon v. Barry*, 967 F. Supp. 535, 538 (D.D.C. 1997) (detailing the over 15-year history of the *Dixon* decree, the court noted, "while the Court saw the 1980 Order as the . . . end of the litigation, in hindsight, . . . the 1980 Order was only the beginning"); *Wyatt By and Through Rawlins v. Sawyer*, 105 F. Supp. 2d 1234, 1236 (M.D. Ala. 2000) ("This litigation has traveled a long, winding, and often quite bumpy course. . . . ").

In short, the complexity and longevity of institutional reform decrees make the reformation of public institutions by decree "a more hazardous venture than it is frequently made out to be." Horowitz, *supra*, at 1288. The complexity

of such a venture is fraught with more legal complications when, as in the case at bar, the underlying suit has been brought only through the limited vehicle of the *Ex parte Young* doctrine. When a federal court finds constitutional or federal statutory violations, enforcement of the terms of a decree against state officials that remedy the violation remains faithful to *Ex parte Young*. However, in unlitigated consent decrees, whether a federal right has actually been violated has not been established, and the alleged violation may have been eliminated. Or, there may be no guarantee that the action mandated in the decree will actually eliminate any violations. Not only does enforcement of the decree provision in such circumstances violate *Ex parte Young*, but enforcement is also likely to rest on misconceptions about the state officials' level of compliance and actual control over achieving compliance, and the voluntary nature of their entry into the decree. Such assumptions ignore the reality of consent decrees.

A. As A Practical Matter, State Officials Often Have Little Choice But to Enter Into A Consent Decree When Faced With Protracted, Costly Litigation On Emotionally-Charged, Highly-Politicized Issues.

A state official's entering into an unlitigated consent decree in institutional reform litigation may be voluntary in the strictly legal sense, but as a practical matter, state officials often have little choice. Commentators have recognized that officials are backed into a corner when faced with an institutional reform suit. Consent decrees are "often forced upon an agency without consideration of the agency's ability" to comply. Joseph F. DiMento & Dean W. Hestermann, *Ordering the Elephants to Dance: Consent*

Decrees and Organizational Behavior, 43 J. Urb. & Cont. L. 301, 307 (1993). It is well understood that the plaintiff, through the threat of litigation and potentially of judgment, "holds the trigger" throughout settlement negotiations and thus dominates the bargaining process. Judith Resnik, *Judging Consent*, 1987 U. of Chic. Legal F. 43, 74 (1987).

Defendants may have many reasons for feeling compelled to settle an institutional reform lawsuit. They may hope to curtail expenses, though given the extensive litigation in many consent decree cases, that hope may not often be realized. *See* Resnik, *supra*, at 69 ("[W]e cannot say with certainty that the net costs [of consent decrees over litigation] are less. . . . "). They may wish to avoid adverse publicity, or defendants who believe they have broken no law nonetheless might wish to implement socially beneficial reforms. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models without Meaning*, 29 B.C. L. Rev. 291, 322-23 (1988). With a court order behind them, officials might believe they will be able to obtain additional funding from the legislature and "obedience to the agreement from lower level employees." Resnik, *supra,* at 74. Like any other defendant, state officials simply wish to avoid the time and expense of litigation. But unlike private parties, state officials are motivated to settle to avoid the public perception that by litigating an institutional reform suit, they are callous to the needs of children, the elderly, or other vulnerable groups.

B. The Assumption That State Official Defendants Fully Control Compliance With All Terms Of A Consent Decree Is Misguided.

Underlying Petitioners' argument that District Courts have the authority to enforce every provision of a consent decree is an unspoken assumption that the state officials who are required to comply with the decree actually have the ability to ensure compliance. This assumption ignores the enormous complexity of public institutions. Problems in institutions are "frequently so complex that even bureaucrats and other non-judicial experts in the field have failed to resolve them." *Implementation Problems*, *supra*, at 428. The complexity of large organizations is a more important factor in the difficulties encountered in implementing consent decrees than is incompetence or deliberate resistance. *See* Horowitz, *supra*, at 1296. Significant action by an organization requires the coordination of its internal components and frequently the cooperation of various external institutions, groups or systems. *Id.* Many forces and interests, some not necessarily represented in the litigation, must come together before the intended goals of the consent decree can be achieved. *See id.* The decree's implementation will depend on organizations that often lie beyond the reach of the court issuing the decree. DiMento & Hestermann, *supra*, at 323. Even if the state officials are actually able to comply with the decree, "there is no guarantee that its goals will be met." *Id.*

The reality of institutional reform litigation is that fully implementing all provisions of a consent decree is often far more complex and difficult than anticipated. Plaintiffs unwilling to accept institutional limitations and

to renegotiate more workable consent decree terms often turn to enforcement proceedings. Unfortunately, the enforcement proceeding does not necessarily produce the fix plaintiffs desire. As one court observed, "the history of this decree is notable not for its success[,] . . . but for what it has illuminated about the character and limitations of the executive, municipal, and judicial institutions involved." *Board of Educ. of Chicago*, 799 F.2d at 283.

Another barrier for state officials trying to comply with exacting consent decrees is budget constraints. Even if officials are able to obtain sufficient funding to attempt to meet terms of the decree, other state agencies pay a heavy price. The impact of consent decrees is that, often, the relationships between competing agencies' interests results in distortions in the allocation of government resources between the different entities. *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 269-71 (1987). As Justice O'Connor observed:

> Public officials often operate within difficult fiscal constraints; every dollar spent for one purpose is a dollar that cannot be spent for something else. While the lack of resources can never excuse a failure to obey constitutional requirements, it *can* provide a basis for concluding that continued compliance with a decree obligation is no longer "equitable."

Rufo, 502 U.S. at 396 (O'Connor, J., concurring) (emphasis in original). "In the real world . . . officials in different agencies at different levels of authority are engaged in continuous pulling and hauling over resources, priorities, and subtle gradations of policy. A consent decree can be an

all too ready handle for officials at one level to manipulate their superiors or rivals . . . . " Rabkin & Devins, *supra*, at 271.

Whether or not a provision of a consent decree can actually be carried out more often than not involves factors beyond the control of the individual state official who is named. The complexity of the problem the decree is aimed at remedying, the lack of cooperation by third parties, and budget constraints may all hinder compliance with decree terms. These obstacles are not always expected or understood by the parties when they enter the decree. In such cases it makes neither legal nor common sense for state officials to comply with every provision of a decree originally agreed upon unless there is an ongoing federal violation.

III. THE FIFTH CIRCUIT'S APPROACH REMEDIES MANY OF THE CURRENT PROBLEMS PARTIES AND COURTS FACE WITH ENFORCING DECREES.

A. Consent Decrees Should Not Be Enforced So As To Bind State Officials' Successors In Office.

Given that institutional reform consent decrees are complex, difficult to comply with, and often last for decades, they very frequently have the effect of binding state officials to policies to which their predecessors (often reluctantly) agreed. This Court has long recognized that enforcing a contract against a state government which binds the hands of successors in office cannot be tolerated in a democracy:

> [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

Stone v. Mississippi, 101 U.S. 814, 820 (1879). The Constitution itself was created with this principal in mind, as Justice Brennan has noted: "The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). Even while enacting the Contract Clause in Article I – which forbids the states from passing laws that limit contractual obligations[4] – the Framers recognized that the Constitution should not trump the doctrine of sovereign immunity. *See* Rabkin & Devins, *supra,* at 211 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-24 (1934)). From the principle of sovereign immunity

[4] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " U.S. Const. Art. I, § 10.

flows the recognition that contracts cannot be enforced so as to hinder a state's ability to carry out basic governmental functions.

Thus, this Court has held that the Contract Clause must give way to sovereign immunity if enforcing a contract against a state will impair that state's ability to exercise its governmental powers or unnecessarily bind successors in office. *See West River Bridge Co. v. Dix*, 47 U.S. (1 How.) 507, 531-32 (1848) (holding Contract Clause could not be applied to state contract so as to override states' power of eminent domain); *Butler v. Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402, 416-18 (1850) (holding Contract Clause could not prevent states from enacting legislation modifying state officials' tenure because ability to control officials' tenure "is indispensable for the preservation of the body politic"); *Boyd v. Alabama*, 94 U.S. 645, 650 (1876) ("We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare. . . . ").

Consent decrees, like any settlement agreement, are essentially contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract. . . . "). Just as with contracts, consent decree provisions that unnecessarily hinder states from carrying out their governmental functions or bind successors-in-office should not be enforced. *See* Rabkin & Devins, *supra,* at 209 (noting that Court's decision in *Firefighters* "reaffirms that what parties cannot agree to in ordinary contracts, they cannot make binding through consent decrees.").

Yet state government's ability to adopt policy, legislation, and budgets is increasingly compromised when District Courts enforce provisions of consent decrees where there is no evidence of a constitutional violation. With consent decrees frequently spanning decades, they bind not only the successors to the originally named state officials, but also the state legislators and other appointed and elected officials. Decisionmaking is transferred from the political arena to the courts. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976) ("[I]n actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager."). Successors to the originally-named official defendants are bound by policies and procedures they had no role in implementing and with which they may disagree. *See, e.g.*, DiMento & Hestermann, *supra*, at 307 ("[P]otentially unrepresentative decrees bind successors in office, despite their lack of adequate representation in the negotiation process and their failure to assent to the provisions of the decree."). When government defendants enter into a consent decree, debate on major public policy issues is frozen and successors in office are bound until every provision of the decree is achieved.

The result is that "one administration . . . commit[s] its successors to policies they might not otherwise have chosen. And it presents the risk that major policy decisions will be fixed in secret negotiations with small groups of private plaintiffs rather than through the more open and accountable procedures of ordinary executive decisionmaking." Rabkin & Devins, *supra*, at 204. Such binding of

successors is a common problem. Indeed, the United States, which has filed an amicus brief supporting the Petitioners in this case, has often argued against enforcement of consent decrees that it claimed would tie the hands of the executive branch. *See, e.g., id.* at 257-58. Although the Fifth Circuit decision this Court is reviewing involved state officials, not "the state" as a defendant, consent decrees naming heads of state agencies and divisions, and often the governor of the state as well, are, for purely practical purposes, suits against the state and its agencies. These consent decrees stretch the *Ex parte Young* legal fiction almost to the breaking point.

At least one Federal Court of Appeals judge has expressed concern that District Courts are not vigilant in ensuring that consent decree provisions are not enforced so as to bind successors. *Evans*, 10 F.3d at 482 (en banc) (plurality opinion) (noting that "a hectored district judge, eager to reach the next case in the queue" may fail to consider critical principles such as "preserving democratic governance, separating the judicial and political spheres, [and] respecting state autonomy in the absence of a federal rule" when enforcing consent decree provisions). Adopting the Fifth Circuit's ruling, which requires plaintiffs to show that violating a provision of a consent decree also violates a federal right, would properly preserve state governments' ability to function democratically, while vindicating the supremacy of federal law.

B. Modification Has Proven An Ineffective Tool For Relieving The Problems States Face In Attempting To Comply With Consent Decrees.

In its amicus brief, the United States recognizes that "[a] State that has entered into a decree may have legitimate reasons for wanting to be relieved of obligations imposed by a consent decree," *see* Brief for the United States as Amicus Curiae, at 19, and suggests that states can simply seek modification under the standard this Court announced in *Rufo*.[5] However, the *Rufo* standard is difficult to meet.

The *Rufo* standard was intended to allow District Courts more flexibility in modifying institutional reform consent decrees, *see* 502 U.S. at 383, and allows courts to modify a decree if the party seeking modification shows either a significant change in law or fact. *Id.* at 384. The *Rufo* standard, however, has not necessarily eased the enforcement problems defendants face. For example, in *Cooper v. Noble*, 33 F.3d 540 (5th Cir. 1994), defendants argued both factual changes – a new prison had been built that had improved prison conditions – and legal changes – a newly released Supreme Court decision made it plain that some provisions of the decree were not constitutionally required. *Id.* at 543-44. The court refused to modify the decree, holding defendants failed to show the factual changes affected their ability to comply with the decree

[5] The United States made the same mistake as many observers, assuming the defendant to a consent decree is "the state" when in fact the defendants are state officials.

and ruling that under *Rufo* the court had the authority to enforce a provision exceeding constitutional requirements. *Id.* at 544-45. Similarly, in *John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001), the state defendants sought modification of a consent decree governing compliance with federal Early Periodic Screening, Diagnosis and Treatment requirements, arguing both changes in fact, and that the decree was unworkable because defendants could not force third-party insurers to participate. *Id.* at 812. The district court refused to modify the decree, even while recognizing that "the current Remedial Plan is unworkable." *Id.*

Even though *Rufo* was designed to make modification a viable option for government defendants in institutional reform decrees, District Courts have tended to interpret *Rufo* to mean that courts *can enforce* provisions of consent decrees against government defendants even if the provision exceeds constitutional requirements. *See, e.g., Cooper*, 33 F.3d at 544-45 (holding that under *Rufo* the district court had the authority to enforce a decree provision exceeding constitutional requirements).

District Courts have also tended to interpret *Rufo* to limit, rather than expand, the circumstances when modification is appropriate. In *Menke*, for example, the district court held:

> Modification of a consent decree is appropriate: (1) "when changed factual conditions make compliance with the decree substantially more onerous," (2) "when a decree proves to be unworkable because of unforeseen obstacles," or (3) "when enforcement of the decree without modification would be detrimental to the public interest."

Menke, 176 F. Supp. 2d at 811 (quoting *Rufo*, 502 U.S. at 384). While *Rufo* did enumerate these three examples of when modification "may be warranted," *Rufo*, 502 U.S. at 384, *Rufo* did not state that these were the only circumstances when a district court should modify a decree. *See id.* The very problem that Justice O'Connor predicted in her concurring opinion, that "[p]ortions of the Court's opinion might be read to place new constraints on the District Court's discretion," *id.* at 397 (O'Connor, J., concurring), has been realized.

IV. ALLOWING ENFORCEMENT OF A CONSENT DECREE ONLY AFTER A SHOWING OF AN ONGOING FEDERAL RIGHT VIOLATION IS A GOOD RESOLUTION FOR BOTH SIDES, AND WILL GIVE COURTS CLEAR GUIDANCE ON HOW TO APPROACH ENFORCEMENT ACTIONS.

A. Adopting The Fifth Circuit Rule Will Not Spell The End Of Consent Decrees.

Petitioners and their Amici claim plaintiffs will never want to enter into consent decrees if the Fifth Circuit rule is adopted. Petitioners' Brief at 41-42; Brief for the United States as Amicus Curiae at 19; Brief for the AARP, et al., as Amicus Curiae at 26-27. But if all plaintiffs in institutional reform litigation against state officials took every case to trial, they would only be entitled to prospective injunctive relief necessary to eliminate any violation of federal right that plaintiffs were able to prove at trial. In other words, plaintiffs lose nothing under a rule requiring them to show an ongoing violation of federal rights when seeking enforcement of a consent decree provision. "Recognizing that a substantial federal claim must undergird a

consent decree does not make plaintiffs less willing to settle: the decree still provides relief, which may be tailored more closely to the parties' circumstances than a remedy of the judge's devising could be." *Evans*, 10 F.3d at 482 (en banc) (plurality opinion).

The economic model of settlement supports this conclusion. If parties can gain the same, or better remedy, through negotiations, than they can through the expenses of discovery and a full-blown trial, while avoiding the uncertain results of trial, plaintiffs will still elect to settle. "The settlement saves these costs, which the parties can divide, making each better off than it expects to be after a trial." Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. of Chic. Legal F. 19, 19 (1987).

Plaintiffs will also be motivated to continue entering into consent decrees by the need to collect attorneys' fees. The lifeblood of private attorneys general lawsuits is the fee-shifting provisions of many federal statutes. *See* Horowitz, *supra*, at 1276. Many of the statutes plaintiffs sue under in institutional reform litigation, such as 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1973l(e), require plaintiffs to secure a change in the legal relationship between the parties through a court order to be deemed a prevailing party. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602-05 (2001). Consent decrees qualify as a court order. *Id.* at 604.

In some cases, a federal rights violation may be remedied before trial. *See id.* at 608-09. By refusing to negotiate a consent decree when state officials are willing, plaintiffs might find themselves in a situation in which

state officials resolve federal rights violations during the protracted discovery phase of litigation, leaving plaintiffs without a judgment or order, and hence no attorney fees. Plaintiffs would gain the satisfaction of having eliminated a federal rights violation, but would be deprived of critical fee awards. Even if some provisions of a consent decree are ultimately unenforceable, plaintiffs would still fair better by settling than by litigating.

B. Overturning The Fifth Circuit Ruling Will Make State Officials Less Willing To Enter Into Consent Decrees.

States locked into consent decrees find themselves spending millions of dollars, not only on attempting to implement decree provisions, but also on paying the costs for monitors to track compliance, or for special masters the court may have ordered to create plans to achieve decree provisions. *See, e.g.*, American Public Welfare Association, *Review of Public Child Welfare Litigation in Selected Jurisdictions*, 21 (April 1998). After many years of learning these difficult lessons, state officials are already less willing to enter decrees that may prove unworkable. As one state official involved in implementing a child welfare consent decree put it when asked to give advice to other states, "Consent decrees ... are a dead end." *Id.* at 26. Another suggested, "Instead of entering into a consent decree, litigate or negotiate a settlement agreement." *Id.*

If this Court rules that every provision of a consent decree will be enforceable, regardless of whether there is any remaining constitutional violation, then states will certainly be less willing to enter into decrees. Consent decrees are by and large instruments which specify how a state is to go about the difficult task of reforming complex

bureaucratic organizations to meet federal legal requirements. With the standard for modification set at a high level, it is important that enforcement actions be limited to actual, ongoing federal rights violations.

Even if upholding the Fifth Circuit Court of Appeals decision results in state officials entering fewer consent decrees, such a result is a price worth paying.

> [S]ettlement is not an end in itself. It is a means of resolving disputes harmoniously. Many things are more important: preserving democratic governance, separating the judicial and political spheres, respecting state autonomy in the absence of a federal rule.... Settlements purchased at the cost of putting the court in control of state and local budgets come at too high a cost.

Evans, 10 F.3d at 482. Basic democratic principles should not be sacrificed merely for fear that there will be fewer consent decrees with state official defendants.

CONCLUSION

The State *Amici* respectfully ask this Court to uphold the Fifth Circuit Court of Appeals' decision. Institutional reform consent decrees have become a part of state governments' operation. There is no doubt that these agreements have benefited both plaintiffs and state defendants. But states bogged down in decades-old decrees requiring detailed, exacting performance of complex tasks, when there has never been any adjudication of a federal violation, reasonably wish to place limits on decree provisions that can be enforced against them. The *Amici* States have attempted to dispel the appearance that states knew

exactly what they were getting into when they entered a decree and simply have buyers' remorse. The reality is that reforming institutions is incredibly complex and difficult. Neither plaintiffs nor defendants know if the reformation plan formalized in a decree will actually work. State official defendants should not be bound by every provision of a decree unless the plaintiff can show an actual constitutional or federal statutory violation. Upholding this rule will allow plaintiffs and state official defendants in decrees to focus on improving state institutions and shift the focus away from litigating over enforcement.

Respectfully submitted,

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APPENDIX A

Table of Representative Current Consent Decrees

Case Name	Case Number	Date Entered	Date(s) Modified	Subject of Decree	Additional References
Milburn v. Coughlin	79cv5077 (S.D.N.Y.)	1980	1991	Medical treatment of disabled inmates at state Correctional Facility	Woods v. Goord, 2002 WL 731691, *7, n.13 (S.D.N.Y.) (detailing history of the Milburn decree).
Reynolds v. Alabama Dept. of Trans.	Civ. 85-T-665-N (M.D. Ala.)	1994	2000	Discriminatory employment practices	Reynolds v. Alabama Dept. of Trans., 84 F. Supp. 2d 1339 (M.D. Ala 2000) (extending length of decree for an additional 4 years).
Dixon v. Barry	Civ. A.74-285 (D.D.C.)	1980	1992, 1997	Care of disabled individuals in D.C. hospital	Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) (detailing history of the decree and ordering appointment of a special receiver to oversee implementation of the decree).
Reese v. Evans	Civ. 82-1251 (N.D. Ga.)	1982	1998	Various aspects of prison conditions, including renovation and expansion	
Rolland v. Cellucci	CV. A. 98-30208 (D. Mass.)	2000		Treatment conditions of disabled individuals in nursing homes	Rolland v. Cellucci, 191 F.R.D. 3 (D. Mass. 2000) (approving settlement agreement); Rolland v. Cellucci, 198 F. Supp. 2d 25 (D. Mass. 2002), aff'd, 318 F.3d (1st Cir. 2003) (allowing plaintiff's motion for further relief under consent decree).
Rosen v. Tennessee Com'r. of Finance and Admin.	3:98-0627 (M.D. Tenn.)	2001		Administration of state's managed health care program	Rosen v. Tennessee Com'r of Finance and Admin., 204 F.Supp. 2d 1048 (M.D. Tenn. 2001), aff'd, 288 F.3d 918 (6th Cir. 2002) (granting plaintiffs' motion to enforce the decree).

Table of Representative Current Consent Decrees (cont.)

Case Name	Case Number	Date Entered	Date(s) Modified	Subject of Decree	Additional References
Shakman v. Democratic Organization of Cook County	69C.2145 (N.D. Ill.)	1972, 1983		Elimination of hiring practices based on political patronage by various government defendants	Shakman v. Democratic Organization of Cook County, 569 F. Supp. 177 (N.D. Ill. 1983) (approving consent order); Shakman v. Democratic Organization of Cook County, 607 F. Supp. 1086 (N.D. Ill. 1985) (amending order); Shakman v. Democratic Organization of Cook County, 2001 WL 1155274 at *1 (N.D. Ill.) (noting that "the 1972 and the 1983 Consent Judgments remain in full force and effect.").
Handschu v. Special Services Div.	71 Civ. 2203 (S.D.N.Y.)	1985	2003	Surveillance operations of New York City Police Department	Handschu v. Special Services Div., 605 F. Supp. 1384 (D.C.N.Y. 1985), aff'd, 787 F.2d 828 (2d Cir. 1986) (approving consent decree). 2003. Handschu v. Special Services Div., 2003 WL 1529197 (S.D.N.Y.) (modifying consent decree).
Benjamin v. Fraser	75 Civ. 3073 (S.D.N.Y.)	1980	2000	Procedural safeguards for classifying inmates as requiring enhanced restraint status	Benjamin v. Kerik, 102 F. Supp. 2d 157 (S.D.N.Y. 2000), aff'd, 264 F.3d 175 (2d. Cir. 2001) (modifying decree in light of Prison Litigation Reform Act of 1995); Benjamin v. Fraser, 2002 WL 31845111 (S.D.N.Y.) (finding defendants in contempt for failing to comply with decree provisions).
Emma C. v. Eastin	C96-4179 (N.D. Cal.)	2000		School district and state's department of education compliance with IDEA	Emma C. v. Eastin, 2001 WL 1180636 (N.D. Cal.) (finding school district in contempt for failing to comply with decree and discussing history of litigation).

Table of Representative Current Consent Decrees (cont.)

Case Name	Case Number	Date Entered	Date(s) Modified	Subject of Decree	Additional References
John B. v. Menke	3:98-0168 (M.D. Tenn)	1998		Provision of early childhood preventative care under state health program	John B. v. Menke, 176 F. Supp. 2d 786 (M.D. Tenn. 2001) (appointing special master to oversee state's compliance with decree and detailing consent decree provisions).
David C. v. Leavitt	93-C-206 (D. Utah)	1994	1999	Institutional reform of child welfare agency	David C. v. Leavitt, 242 F.3d 1206 (10th Cir. 2001), cert. denied, 534 U.S. 822 (2001) (holding that district court's extension of decree's original four-year period was permissible.)
Felix v. Lingle	93-00367 (D. Haw.)	1994	2000	State agency's compliance with IDEA	
U.S. v. Hawaii	91-00137 (D. Haw.)	1991		Conditions at state psychiatric facility	
Makin v. Hawaii	98-000997 (D. Haw.)	2000		Timely provision of Medicaid services to disabled individuals	

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IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, CARLA FREW, *et al.*,

Petitioners,

v.

ALBERT HAWKINS, Commissioner of the Texas Health and Human Services Commission, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars a federal court from ordering state officials to comply with provisions of a consent decree absent a showing that the provisions are necessary to vindicate a federal right.

2. Whether state officials waived Texas's Eleventh Amendment immunity by entering into the consent decree in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM ORDERING STATE OFFICIALS TO COMPLY WITH PROVISIONS OF A CONSENT DECREE UNLESS NECESSARY TO VINDICATE A FEDERAL RIGHT	6
A. The Eleventh Amendment Bars A Suit Against A State For Injunctive Relief Except When Necessary To Prevent A Continuing Violation Of Federal Law	7
B. Petitioner's Motion To Enforce The Decree Is Barred By The Eleventh Amendment	10
II. TEXAS HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY	21
CONCLUSION	30

TABLE OF AUTHORITIES

Cases — Page

Alabama v. Pugh, 438 U.S. 781 (1978) 7
Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*
Alexander v. Choate, 469 U.S. 287 (1985) 16-17
In re Ayers, 123 U.S. 443 (1887) ..... *passim*
Calderon v. Ashmus, 523 U.S. 740 (1998) 27
Clark v. Barnard, 108 U.S. 436 (1883) 24
College Savings Bank v. Florida Prepaid Post-sec. Ed. Expense Bd., 527 U.S. 666 (1999) 22, 24
Edelman v. Jordan, 415 U.S. 651 (1974) 27
Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993) 13
Firefighters v. City of Cleveland, 478 U.S. 501 (1986) ..... *passim*
Gardner v. New Jersey, 329 U.S. 565 (1947) 24
Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 7
Green v. Mansour, 474 U.S. 64 (1985) 7, 8, 9, 10
Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906) 24, 25, 27
Hagood v. Southern, 117 U.S. 52 (1886) 4, 9, 14
Heckler v. Community Health Services, 467 U.S. 51 (1984) 27, 27-28, 29
Humphrey v. Pegues, 83 U.S. (16 Wall.) 244 (1872) 27
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 7, 8, 10
Kasper v. Board of Election Comm'rs, 814 F.2d 332 (7th Cir. 1987) 12
Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989) 11

TABLE OF AUTHORITIES—Continued

Page

Lapides v. Board of Regents, 535 U.S. 613 (2002) ..... *passim*
Lynch v. United States, 292 U.S. 571 (1934) 14-15, 15, 25
Lyng v. Payne, 476 U.S. 926 (1986) 27
Milliken v. Bradley, 433 U.S. 267 (1977) 12, 18, 23, 28
Missouri v. Fiske, 290 U.S. 18 (1933) 7
Missouri v. Jenkins, 515 U.S. 70 (1995) 18, 28
New York v. United States, 505 U.S. 144 (1992) 21-22
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) ..... *passim*
Pharmaceutical Res. & Mfgrs. of America v. Walsh, 123 S.Ct. 1855 (2003) 8, 8-9, 9, 16-17
Printz v. United States, 521 U.S. 898 (1997) 15
Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992) 13, 18
Saenz v. Roe, 526 U.S. 489 (1999) 13
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 8
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 14
United States v. King, 395 U.S. 1 (1969) 22
Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Constitutional Provisions, Statutes and Rules

Fed. R. Civ. P. 8(a) 23
42 U.S.C. § 1396(a)(43) 2
§ 1396(a)(43)(D) 3
§ 1396c 8
U.S. Const. Amend. XI 7-8
U.S. Const. Art. VI, cl.2 ..... 8, 14

TABLE OF AUTHORITIES—Continued

Other Authorities — Page

Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295 ..... *passim*

Andy Schneider & Rachel Garfield, *Medicaid Benefits*, in *The Medicaid Resource Book* (Kaiser Comm'n on Medicaid and the Uninsured 2002) 17

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state governments.

The Eleventh Amendment serves the essential purpose of protecting "the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). While the Court has held that the Eleventh Amendment does not bar a suit against state officials for prospective relief when necessary to vindicate a federal right, *see Ex parte Young*, 209 U.S. 123 (1908), the Court has made clear that Eleventh Amendment immunity can be overridden only to "vindicate the supreme authority of federal law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

This case presents two important questions regarding a federal court's authority to override a State's Eleventh Amendment immunity and order state officials to comply with a consent decree. The first is whether a federal court can enforce a decree provision against a State when there is no showing that enforcement is necessary "to vindicate a federal right." Pet. App. 24a. The second is whether a State, by entering into a decree, permanently waives its immunity to any subsequent enforcement proceeding including proceedings brought to compel enforcement of provisions which do not remedy violations of federal law.

---

[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

Because of the importance of these questions to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

STATEMENT

1. In 1993, petitioners brought this suit alleging that Texas officials were failing to provide EPSDT benefits to their children. *See* Pet. App. 4a-7a; *see also* 42 U.S.C. § 1396a(a)(43). The district court certified the case as a class action on behalf of a plaintiff class with more than 1.5 million members. *See* Pet. App. 7a. Following the denial of the State's motion to dismiss, the parties entered into settlement talks. *Id.*; *see also* Opp. 1-2. After lengthy negotiations, the parties proposed a consent decree, which the district court entered. *See* Opp. 2. The seventy-eight page decree "orders the state defendants to implement many highly detailed and specific procedures relating to the EPSDT program." Pet. App. 8a & n.9.

As the court of appeals recognized, Texas officials made substantial efforts to comply with the decree and improve the administration of the State's EPSDT program. *See id.* at 3a-4a. For example, Texas increased the number of employees and contract personnel working in the program "from about ten in 1993 to almost 500 in 2000." *Id.* at 3a. "Texas spends more than any other state on informing and outreach programs," and increased the number of contacts with class members from "about 2 million such contacts in 1995" to "about 4.8 million outreach contacts" in 1999, "including about 1.8 million voice-to-voice or face-to-face contacts." *Id.* at 4a.

The State's medical transportation program more than tripled the number of rides it provided "from about 750,000 trips" in 1993 "to 2.5 million trips" in 1999. *Id.* Although not required by federal law, the State also operates numerous toll-free lines to assist class members and "has made striking improvement in the operation of this service." *Id.*

The court of appeals found that as a result of its efforts, the State improved its "participation ratio," a federally mandated criterion for reporting performance to the Secretary, *see* 42 U.S.C. § 1396a(a)(43)(D), "from 18 percent in 1991 to 66 percent in 1998." Pet. App. 3a. While there are "some children [who] are unable or, for whatever reason, fail to take full advantage of" Texas's EPSDT program, *id.* at 4a, petitioners "presented no evidence of having requested and having been denied services." *Id.* at 101a (dist. ct. op.). As the court of appeals recognized, the State has "a substantial program to meet the medical needs of the class members." *Id.* at 3a.

2. In November 1998 petitioners commenced further litigation to enforce the decree. Petitioners asserted among other things that Texas officials were in violation of the decree because they had failed to "implement properly the outreach program and deliver required outreach reports" to petitioners, that they had failed to "assure that all class members receive medical and dental checkups," that they failed to "operate toll-free numbers so as to ensure that all calls are answered promptly by a knowledgeable and helpful staff member," and that they had failed to "provide EPSDT training for health care providers." *Id.* at 10a n.10.

After a hearing, the district court issued a lengthy opinion, which found that the officials had violated "numerous provisions" of the decree. *See id.* at 10a. The court rejected the State's contention that its Eleventh Amendment immunity barred the court from enforcing the decree except insofar as its provisions were necessary to remedy a violation of petitioners' federal rights. The court further ordered the State's officials to submit "proposed corrective action plans to remedy each violation of the decree detailed in Part One" of its opinion. *See id.* at 277a; *see also id.* at 54a-232a (Part One).

SUMMARY OF ARGUMENT

1. The Eleventh Amendment expressly limits a federal court's authority to impose equitable relief in a suit brought by a private party against a State. While the *Ex parte Young* exception authorizes a suit against a State for prospective relief, it does so only when necessary to vindicate the supremacy of federal law. The Court has thus recognized that the Eleventh Amendment bars a suit against state officials to enforce state law, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), and a suit against a state officer to enforce a contract. *See Hagood v. Southern*, 117 U.S. 52 (1886).

Petitioners' motion to enforce the decree does not satisfy the *Young* doctrine's fundamental prerequisite that the relief sought is necessary to remedy a continuing violation of federal law. Indeed, the district court expressly declined to conduct this analysis and held that the standard for *entry* of a decree, *see Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), was applicable to petitioners' motion to enforce. The court so held notwithstanding that *Firefighters* did not involve the standard for *enforcing* a decree and did not involve state defendants. The court accordingly ruled that the decree's provisions could be enforced against the State without any showing that the provisions were necessary to remedy a continuing violation of federal law.

The district court's ruling violated the core tenets of Eleventh Amendment jurisprudence. Most significantly, the Eleventh Amendment serves the essential purpose of protecting "the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. A federal court order directing state officials to comply with consent decree provisions which do not remedy a continuing violation of federal law is clearly

incompatible with the structural principle of protecting the political accountability of state governments. This is true regardless of whether the court "merely order[s]" state officials to submit corrective action plans, Pet. Br. 40, or subjects them to the draconian sanction of contempt.

2. Petitioners err in asserting that Texas has waived its Eleventh Amendment immunity. The provisions of the consent decree do not manifest the State's clear and unequivocal intent to waive its immunity to petitioners' enforcement motion. Nor does Texas' litigation conduct amount to a "voluntary invocation" of federal court jurisdiction, which results in a waiver.

The provisions of the decree relied upon by petitioners state that "[t]he term 'will' creates a mandatory, enforceable obligation," ¶ 302, and that "the parties may request relief from [the district court]" if the "Defendants' future activities [do not] comport with the terms and intent of [the] Decree." ¶ 303. These provisions do not establish a waiver of Eleventh Amendment immunity.

Paragraph 302 merely establishes the State's agreement that some of the decree provisions go beyond the aspirational. Moreover, to the extent the decree creates mandatory, enforceable obligations, the language does not establish the State's consent to be sued in federal court. State law can also create mandatory, enforceable obligations on the part of state officials but that does not make a suit to enforce such obligations sustainable in federal court. *See Pennhurst*, 465 U.S. at 106.

Similarly, that the parties "may request relief from" a federal court does not establish that the State has waived its immunity. This language does not express that the State waived its immunity or any other affirmative defense. Every plaintiff in federal court requests relief, but whether a litigant is entitled to relief is dependent upon the other party's

defenses and the limitations on a federal court's jurisdiction and equitable powers.

Nor should the Court deem the officials' conduct in agreeing to entry of the decree as a voluntarily invocation of federal court jurisdiction which permanently waives the State's Eleventh Amendment immunity. First, there is no basis for the Court to imply such a waiver when petitioners obtained no such concession from the State in the decree itself. Second, the Court has repeatedly held that Eleventh Amendment immunity can be raised at any point in the proceedings. Here there has been no final judgment and there has been no judicial determination that the State has violated federal rights. Allowing Texas to invoke its Eleventh Amendment immunity thus does not threaten the integrity of federal court decrees by undermining a judicial determination that the State has violated federal rights.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM ORDERING STATE OFFICIALS TO COMPLY WITH PROVISIONS OF A CONSENT DECREE UNLESS NECESSARY TO VINDICATE A FEDERAL RIGHT

The court of appeals properly held that the Eleventh Amendment barred the district court from enforcing the provisions of the consent decree absent a showing that a provision is necessary "to vindicate a federal right." Pet. App. 24a. Petitioners' view that a federal district court can enforce a decree against state officials solely based on the test for determining whether the court has authority to enter a consent decree, *see Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986); Pet. Br. 34, is manifestly erroneous.

That a federal court might have authority to enter a consent decree as a general matter does not resolve the further

question of whether the provisions of the decree can be enforced against a State under the *Ex parte Young* doctrine. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997). As explained below, "[a] state's freedom from litigation was established as a constitutional right through the Eleventh Amendment." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). This immunity from suit applies even to suits for injunctive relief, except when necessary to vindicate the supremacy of federal law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984). Where, as here, a plaintiff cannot show that the enforcement of a consent decree's provisions is necessary to prevent a continuing violation of federal law, a federal court must recognize a State's sovereign immunity and dismiss the motion.

A. The Eleventh Amendment Bars A Suit Against A State For Injunctive Relief Except When Necessary To Prevent A Continuing Violation Of Federal Law

The Court has repeatedly held that "[t]he Eleventh Amendment confirms that 'the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.'" *Green v. Mansour*, 474 U.S. 64, 68 (1985) (quoting *Pennhurst*, 465 U.S. at 98). The Court's cases establish that a State's immunity from suit in federal court applies to both actions for damages and those for injunctive relief. *See, e.g., Pennhurst*, 465 U.S. at 106; *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). As the Court has explained, "[e]xpressly applying to suits in equity as well as at law, the amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State." *Missouri v. Fiske*, 290 U.S. 18, 27 (1933). The text of the Eleventh Amendment makes this clear, stating that "[t]he Judicial power of the United States

shall not be construed to extend to any suit in law *or equity*, commenced or prosecuted against one of the United States. . . ." U.S. Const. Amend XI (emphasis added).

To give life to the Supremacy Clause, *see id.* Art. VI, cl.2, the Court has held that the States' constitutional immunity must yield when necessary to vindicate federal rights. *See Pennhurst*, 465 U.S. at 105; *see also Ex parte Young*, 209 U.S. 123 (1908). Under the *Young* doctrine, state officials who violate federal law are "stripped of [their] official or representative character. . . .The state has no power to impart to [its officials] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160. *Young* thus "held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green*, 474 U.S. at 68.

The *Young* doctrine "is not, however, without limitations." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment). For example, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996).

"[A]n action brought against a state official under *Ex parte Young* . . . expose[s] that official to the full remedial powers of a federal court, including . . . contempt sanctions." *Id.* at 75. Where Congress has created other mechanisms to obtain state compliance with federal requirements (such as the withdrawal of funding by the Secretary of a federal agency, *see, e.g.*, 42 U.S.C. § 1396c), the federal courts should be especially wary of authorizing litigants to sue state officials under the *Young* doctrine. *See Pharmaceutical Res. & Mfgrs. of America v. Walsh*, 123 S.Ct. 1855, 1874 (2003) (Scalia, J., concurring) ("the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act is set forth in the Act itself: termination of funding by the Secretary") (citations omitted); *see also id.* at 1876 n. 3 (Thomas, J., concurring) ("States are free to deviate from the Medicaid Act's requirements, subject only to sanctions by the Secretary.").

Most significantly, the *Young* doctrine does not permit a federal court to enjoin state officials to comply with state law. *See Pennhurst*, 465 U.S. at 104-106. As the Court declared in *Pennhurst*, "when a plaintiff alleges that a state official has violated *state* law," the "need to reconcile [the] competing interests [of the Eleventh Amendment and the Supremacy Clause] is wholly absent." *Id.* at 106. As the Court further explained:

> In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. Consistent with this principle, the Court has also long recognized that the Eleventh Amendment prohibits a federal court suit against a state officer to compel performance of a state contract. *See Hagood v. Southern*, 117 U.S. 52, 67-68 (1886) (Eleventh Amendment bars suit against state officer for specific performance of contract); *In re Ayers*, 123 U.S. 443, 504 (1887) (Eleventh Amendment bars suit against state officer for injunction forbidding a breach of contract).

The Court's cases have thus repeatedly reaffirmed that the *Young* doctrine overrides the States' Eleventh Amendment

immunity only when a State is engaged in a "continuing violation of federal law." *Green*, 474 U.S. at 73. As the Court noted in *Green*: "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* at 68. As the Court further observed in *Pennhurst*, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States' . . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights[.]" 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment) (*Young* involves "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective").

B. Petitioners' Motion To Enforce The Decree Is Barred By The Eleventh Amendment

Petitioners' motion to enforce the consent decree does not satisfy the *Young* doctrine's fundamental prerequisite for the exercise of federal equitable powers over a State and its officials—that the relief is necessitated by "an ongoing violation of federal law." *Id.* Indeed, the district court expressly declined to conduct this analysis. Instead, the court held that "'[i]n enforcing the consent decree, the court is bound solely by its language,' and that 'an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree.'" Pet. App. 14a (quoting Pet. App. 71a). This holding—which petitioners embrace—clearly exceeds the

limits of the *Young* doctrine and thus violates the Eleventh Amendment.

1. The district court reasoned that the Eleventh Amendment did not bar petitioners' motion to enforce the decree because it had subject matter jurisdiction to enter the decree under the three part test of *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).[2] *See* Pet. App. 245a-263a. The court expressly rejected the State's (and the Fifth Circuit's) distinction between jurisdiction to enter and jurisdiction to enforce a consent decree against state officials. *See id.* at 257a-260a. Finding the distinction to be "utterly indefensible," *id.* at 257a, the district court explained:

> . . . the policy implications of limiting this distinction are obvious: "Having entered into the consent decree rather than bringing the dispute . . . to trial, [the defendant] cannot now evade an integral portion of that decree on the ground that it was not directly tied to a federal claim." Such an outcome would detract from the integrity of the court by allowing state defendants to avoid bargained-for obligations while receiving the benefit of escaping litigation and potential liability. The parties' intent would also be ignored in such a scheme, and the finality of the parties' voluntary agreements significantly undermined. Obviously, such decree nullification would leave little incentive for future parties to enter into voluntary agreements, which avoid often protracted and time-consuming litigation.

Id. at 258-259a (quoting *Kozlowski v. Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989) (other citation omitted)). Because the decree provisions at issue in petitioners' enforcement motion

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[2] To enter a consent decree, a federal district court must find that the decree: 1) "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," 2) "com[es] within the general scope of the case made by the pleadings," and 3) "further[s] the objectives of the law upon which the complaint was based[.]" *Firefighters*, 478 U.S. at 525 (internal quotations and other citations omitted).

fell "squarely within the parameters outlined in *Firefighters*," the district court held that they "may be enforced against" the State. *Id.* at 261a.

This reasoning is flawed in several respects. First, this Court's decision in *Firefighters* does not establish a jurisdictional rule but rather a set of principles for determining the appropriateness of a federal court's exercise of its equitable discretion to *enter* a consent decree. Notwithstanding that the parties to a lawsuit have negotiated a settlement, a federal district court retains discretion to decline to enter a consent decree. As the Seventh Circuit has explained, "[a] district judge need not lend the aid of the federal court to whatever strikes two parties' fancy." *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 338 (7th Cir. 1987). *Cf. Milliken v. Bradley*, 433 U.S. 267, 279-81 (1977) ("equitable principles" guide a federal court's exercise of its remedial powers). The *Firefighters* standard, which applies to the entry of consent decrees, thus has no bearing on the separate and distinct issue of whether a State can invoke its constitutional immunity under the Eleventh Amendment as a defense to a motion to enforce the decree. Nor could *Firefighters* have resolved the question as neither a State nor its officials were parties in that case. *See* 478 U.S. at 504.

Indeed, adoption of the *Firefighters* standard as the appropriate test for whether a district court can ignore a State's Eleventh Amendment immunity and enforce a decree would be error for two reasons. First, a "consent decree may be entered as a judgment of [a] court without any independent determination by the court that it is warranted under the facts or law pertinent to the case." Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295, 298. But even if state officials likely would have been found to be in violation of federal law at the time the decree was entered—an assumption that underlies the court's authority to enter the

decree, *see, e.g.*, *Evans v. City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993)—petitioners' position further assumes that state officials will continue to violate federal law indefinitely. This assumption is altogether unwarranted given that the purpose of the decree is to correct conditions that presumably violate federal law and that the decree's provisions typically exceed what is necessary to remedy a violation. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 389 (1992). Thus, unless state officials have utterly failed to comply with the decree's provisions, there is no basis for simply assuming several years later that they are continuing to violate federal law.

Second, petitioner's proposal to adopt the *Firefighters* standard as the applicable test for determining whether a decree can be enforced would, in petitioners' language, "trivialize the Eleventh Amendment['s]" role within the constitutional scheme. Pet. Br. 31. While protecting the States' dignitary interests is one of the Amendment's core purposes, the immunity serves a far more fundamental purpose—it limits a federal court's authority to intrude into the policy choices made by a State and its citizenry. *See Alden v. Maine*, 527 U.S. 706 (1999).

The constitutional scheme "'split[s] the atom of sovereignty,'" creating "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Id.* at 751 (quoting *Saenz v. Roe*, 526 U.S. 489, 504 n. 17 (1999)) (other quotations and citation omitted). When a federal court "asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Id.*

Sovereign immunity thus serves the essential purpose of protecting "the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. As the Court has

long recognized, "[w]hen the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'" *Id.* at 750 (quoting *In re Ayers*, 123 U.S. at 505).

The *Young* doctrine overrides these fundamental structural principles only when necessary to "vindicate the supreme authority of federal law." *Pennhurst*, 465 U.S. at 106. This justification is, however, "wholly absent," *id.*, when a party seeking to enforce the provisions of a consent decree either cannot or declines to show that the provisions are necessary to remedy a continuing violation of federal law. Such "bargained-for obligations," Pet. App. 259a (op. dist. ct.), are not "Laws of the United States" and are thus not within the ambit of the Supremacy Clause. U.S. Const. Art. VI, cl.2. As the Court has explained: "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522.

Indeed, but for the district court's entry of the decree, petitioners' suit to enforce the decree's provisions would be indistinguishable from a suit for specific performance of a contract, *see Hagood*, 117 U.S. at 67-68; or a suit for an injunction to restrain a breach of contract. *See In re Ayers*, 123 U.S. at 504; *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("a consent decree or order is to be construed for enforcement purposes basically as a contract"). But as explained above, for more than a century the Court has recognized that the Eleventh Amendment bars a federal court from exercising jurisdiction over these two types of suits against state officials. *See Hagood*, 117 U.S. at 67-68; *Ayers*, 123 U.S. at 504. *See also Lynch v. United States*, 292 U.S. 571, 580-81 (1934) (quoting *The Federalist* No. 81 (Alexander Hamilton)) ("'The contracts between a [State] and

an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.'").

In the absence of the need to remedy continuing violations of federal law, the federal courts do not have authority to police the bargain struck by petitioners with Texas officials. Indeed, this Court's sovereign immunity jurisprudence has long held that "[a]lthough the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity." *Ayers*, 123 U.S. at 505. This rule applies notwithstanding that the consent was "given after much deliberation and for a . . . consideration," *Lynch*, 292 U.S. at 581, and "whatever the character of the proceeding." *Id.* at 582. As the Court further explained in *Lynch*, "immunity from suit is an attribute of sovereignty which may not be bartered away." *Id.*

Thus, this Court's cases flatly reject the district court's rationale. Moreover, the district court's reasoning ignores the availability of forums other than the federal courts for obtaining the State's compliance with its "bargained-for obligations," Pet. App. 259a, to the extent those obligations exceed the requirements of federal law. Most significantly, the Constitution does not grant the federal courts a general authority to supervise the agencies of state governments.

That the "bargained-for-obligations" have been given the imprimatur of a federal court order does not change this fundamental fact. *See* McConnell, *supra*, at 302 (a consent decree "gains no authority by virtue of being filed with the court"). A federal court order directing state officials to comply with decree provisions which do not remedy a continuing violation of federal law is clearly incompatible with the structural principle of protecting political accountability as manifested in *Alden* and *Printz v. United States*, 521 U.S. 898, 920-21 (1997). This is true whether the

court "merely order[s]" state officials to submit corrective action plans, *see* Pet. Br. 40, or subjects them to the draconian sanction of contempt.

"[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden*, 527 U.S. at 751. Because all claims on a State's resources "cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made." *Id.*

Under the framework created by the Constitution, States have the right to change their policies and funding priorities. Except when a State's policy and allocation decisions violate federal law, the Constitution does not assign the federal courts a role in supervising this process. As the *Alden* Court further observed: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

There is thus no merit to petitioners' contention that "[i]t would impugn the federal courts' integrity to allow State officials to reassert immunity from enforcement of agreed consent decrees." Pet. Br. 31-32; *see also* Pet. App. 258a-259a (dist. ct. op.). As the Eleventh Amendment and the Court's *Young* jurisprudence make clear, the federal courts' integrity cannot be impugned when the Constitution expressly denies those courts the authority to order state officials to comply with decree provisions absent a need to remedy a continuing violation of federal law.

3. These principles apply fully in the context of litigation regarding a State's Medicaid program. While federal law establishes minimum requirements that state Medicaid programs must meet, it also "'gives the States substantial discretion to choose the proper mix of amount, scope, and duration limits on coverage.'" *Alexander v. Choate*, 469 U.S. 287, 303 (1985) (quoted in *PhRMA*, 123 S.Ct. at 1868 (opinion of Stevens, J.)). *See also* Andy Schneider & Rachel Garfield, *Medicaid Benefits*, in *The Medicaid Resource Book* 51 (Kaiser Comm'n on Medicaid and the Uninsured 2002) (States "have broad discretion to determine which categories of benefits their Medicaid programs will cover"). For example, prescription drugs, dental services, physical therapy, hospice care, prosthetic devices, and eyeglasses are optional benefits. *See id.* at 53. Moreover, although EPSDT services for persons under 21 are mandatory, diagnostic, screening, preventive and rehabilitative services for other Medicaid patients are optional. *See id.*

The States do not have limitless resources to spend on Medicaid. The cost of complying with a federal court decree thus may well result in a State being forced to limit the scope of optional benefits. While this may be a tolerable result when a decree's provisions must be enforced to remedy a continuing violation of federal law, it is a particularly untoward one when there is no showing of such a violation.

4. The district court also expressed the policy concern that if the State could invoke its Eleventh Amendment immunity in an enforcement action there would be "little incentive for future parties to enter into voluntary agreements, which avoid often protracted and time-consuming litigation." Pet. App. 259a. Petitioners likewise argue that under the court of appeals' rule, "plaintiffs will not enter into consent decrees with State official-defendants because plaintiffs will have to prove their case on the merits" in order to obtain judicial enforcement. Pet. Br. 34. According to petitioners, "[p]laintiffs will not waste time and energy to negotiate decrees that cannot be enforced without a full trial." *Id.* While these policy arguments cannot override a State's constitutionally protected immunity, they are in any event unpersuasive.

First, the argument ignores that plaintiffs will frequently obtain more relief from the State as a result of the settlement—even if the State can later assert its immunity in an enforcement proceeding—than they would have obtained if the case had gone to trial and been appealed. *See Rufo*, 502 U.S. at 389; *cf. Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (following trial "'the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation'") (quoting *Milliken*, 433 U.S. at 280).

Second, it ignores that "[t]he private party will obtain the relief it seeks for some period of time, perhaps forever, without the expense of trial." McConnell, *supra*, at 307. Contrary to petitioners' contention, "[f]uture officials may not object to the substantive terms of the decree." *Id.* Furthermore, "[f]uture officials . . . may be restrained from seeking to rescind [a consent decree] because of regulatory inertia, political pressure, or the desire to maintain good will with parties that have frequent contacts with the agency." *Id.* Indeed, the obligations created by a decree may provide plaintiffs' advocates with a useful bargaining tool in the state appropriations process. Moreover, the relief will be obtained sooner rather than years later after the lengthy process of trial and appeal.

Third, petitioners' argument makes two erroneous assumptions. The first is that state officials will not make good faith efforts to implement their part of the bargain. The second is that these efforts will not bring about substantial reforms in the way a state agency performs its functions.

This case amply demonstrates the above points. As one example, Texas officials have provided multiple toll-free lines to assist class members in obtaining checkups and transportation services. *See* Pet. App. 26a (ct. app. op.); *see also* Plaintiffs' Prehearing Motion to Enforce Consent Decree, ¶¶ 87-97. The State provided these lines even though they are

not "required by federal law or regulation." Pet. App. 26a (citation omitted).[3]

Moreover, the State made substantial improvements in its administration of the EPSDT program. Indeed, "Texas spends more than any other state on informing and outreach programs." *Id.* at 3a-4a. Among other things, the State increased the number of state and contract personnel assigned to the program "from about ten in 1993 to almost 500 in 2000." *Id.* at 3a. Furthermore, "[i]n 1999 [Texas] made about 4.8 million outreach contacts to class members[,] [which was] up from about 2 million such contacts in 1995." *Id.* at 4a. Most significantly, the State improved its "participation ratio"—a Center for Medicare and Medicaid criterion for assessing state performance—"from 18 percent in 1991 to 66 percent in 1998." *Id.* at 3a. If this case had gone through the lengthy process of trial and appeal, it is unlikely that Texas's program would have so quickly achieved so many substantial improvements.

Petitioners also argue that under the court of appeals' rule, plaintiffs will not agree to consent decrees and that both "plaintiffs and State officials will lose" the option of settlement. Pet. Br. 42. Petitioners' rule is, however, even more likely to eliminate the option of settlement.

It is improbable that any complex decree can be drafted without ambiguity. Indeed, even when a decree is well drafted—at least to the eyes of third parties—the parties may have different understandings of what its provisions require.[4]

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[3] Petitioners nonetheless seek additional relief—which the district court ordered—because on some of the lines, callers have an average wait of one-and-a-half to four minutes and because "some of Defendant's toll free number staff are not well trained, knowledgeable, helpful and polite." Plaintiffs' Prehearing Motion to Enforce ¶¶ 90, 96.

[4] For example, petitioners assert that "[t]he decree requires the officials to *assure that all* children, including at risk subgroups, receive medical and dental screens." Pet. Br. 45 (citing decree ¶¶ 2, 3, 143, 192, 212)

Under petitioners' view, plaintiffs would be able to seek a federal court order enforcing their interpretation of a provision without regard to the reasonableness of that interpretation. Plaintiffs would be able to summon the State to defend itself even though judicial enforcement of their interpretation would interfere with other important state priorities and without regard to whether the State's compliance is necessary to remedy a continuing violation of federal law.[5] Moreover, petitioners could invoke this right for as long as the decree provisions remain in effect. If entry of a decree effectuates a State's waiver of immunity to any

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(emphasis added). Petitioners effectively read this provision as a guaranty by the State that every class member will receive the screens.

The decree does not, however, create any such obligation. Of the provisions cited by petitioners, only ¶¶ 192 and 212 even use the word "assure" and only ¶ 212, which pertains to children under the supervision of the Texas Department of Protective and Regulatory Services (TDPRS) arguably imposes such a requirement on Texas officials. *See* Lodging at 56-57 (requiring the Texas Department of Health and TDPRS to enter into a Memorandum of Understanding that will "assure that all EPSDT recipients under the supervision of TDPRS receive all medical and dental check ups when due").

The other cited provision, ¶ 192, pertains only to patients enrolled in managed care and thus applies only to a subset of the class. Furthermore, the provision is plausibly read as requiring the State to "assure" only that managed care organizations provide enrolled class members with EPSDT services "in a timely manner." Lodging at 52; *see also id.* ("TDH will assure . . . that managed care organizations provide . . . checkups to newly enrolled recipients no later than 90 days after enrollment . . . "). The provision does not create an obligation on the part of the State to assure that every class member receives services.

[5] The decree also "contemplates that the parties will reach agreement in the future about several issues." Lodging ¶ 303. Among other things, petitioners sought and obtained federal court relief based on the State's failure to obtain their approval as to whether three of the State's proposed measures of health outcomes were appropriate to measure the health of the class. *See* Plaintiffs' Prehearing Motion to Enforce, at ¶¶ 115-116. *See also* Pet. App. 225a.

enforcement motion, than state officials would do just as well to litigate.

Thus, under the Fifth Circuit's rule ample incentives remain for plaintiffs to settle rather than litigate. In any event, even if the district court's analysis of the "policy implications" had merit, such considerations cannot override Texas' constitutional immunity from suit, which is made explicit by the text of the Eleventh Amendment and is fully supported by more than a century of this Court's jurisprudence. *See, e.g., Pennhurst*, 465 U.S. at 123 ("considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a state").

II. TEXAS HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

Petitioners contend that Texas officials have waived the State's Eleventh Amendment immunity from their motion to enforce the decree. *See* Pet. Br. 18-30. According to petitioners, the language of the decree and the state officials' litigation conduct establish that the State has waived its Eleventh Amendment immunity to any enforcement proceeding.

The Court should reject petitioners' contentions for three reasons. First, the language of the decree does not manifest the State's clear intention to waive its immunity to any subsequent enforcement proceeding. Second, the State's litigation conduct did not effectuate a waiver of its Eleventh Amendment immunity to a subsequent enforcement proceeding. A State has always been able to withdraw its consent to suit, *see Ayres*, 123 U.S. at 505, and allowing it to do so here does not create a "seriously unfair" or anomalous result. *See Lapides v. Board of Regents*, 535 U.S. 613, 619 (2002). Third, petitioners' rule violates the Constitution's structural principle of preserving the political accountability of state governments. *See generally Alden*, 527 U.S. at 750-51; McConnell, *supra*, at 316; *see also New York v. United*

States, 505 U.S. at 169 ("Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."). The judgment of the court of appeals should therefore be affirmed.

1. Petitioners argue that the language of two provisions of the decree (¶¶ 302 & 303) establish that Texas has waived its immunity. *See* Pet. Br. 26-27. It is, however, "'settled'" law that a State's "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *College Savings Bank v. Florida Prepaid Postsec. Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The language of these provisions falls short of the unequivocal expression of intent that is required to show that the State has voluntarily relinquished its constitutional immunity to any subsequent proceeding to enforce the decree.

Petitioners note that ¶ 302 of the decree states that "[t]he term 'will' creates a mandatory, enforceable obligation." ¶ 302, quoted at Pet. Br. 27. Petitioners further note that ¶ 303 provides that "the parties may request relief from [the district court]" if the "Defendants' future activities [do not] comport with the terms and intent of this Decree." ¶ 303; *see* Pet. Br. 26-27. Petitioners assert that these provisions demonstrate that the State has waived its immunity to their enforcement motion.

The language of these provisions does not, however, manifest a clear and unequivocal intent by the State to waive its immunity from suit in federal court. State law also typically creates mandatory and enforceable obligations on the part of state officials but that does not make a suit to enforce such obligations sustainable in federal court. *See Pennhurst*, 465 U.S. at 106. That the decree created "mandatory, enforceable obligations" does not express anything more than the State's agreement that some of the decree provisions go beyond the

aspirational.[6] And even with respect to those provisions, the decree's language does not manifest in clear and unequivocal terms the State's open-ended, unqualified consent to proceedings in a federal court to enforce them. *See* Pet. App. 41a-42a (discussing State's failure to "unequivocally waive[] its Eleventh Amendment immunity" by its litigation conduct).

Nor does ¶ 303's language stating that the parties "may request relief from this Court" alter this conclusion. Paragraph 303 does not say that the State waived its Eleventh Amendment immunity or any other affirmative defense. A litigant can always request relief from a federal court; indeed every complaint is required to have a demand for relief. *See* Fed. R. Civ. P. 8(a). Whether a litigant is entitled to relief is an entirely different matter that depends upon the other party's defenses and the limitations on a federal court's jurisdiction and equitable powers. *See, e.g.*, *Milliken*, 433 U.S. at 282 ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . .") (citation omitted). Paragraph 303 contains no expression of Texas' intent to waive its Eleventh Amendment immunity in every subsequent enforcement proceeding. Nor could the parties, even if they agreed to do so, grant a federal court authority to exceed the inherent limitations on its equitable powers.

Furthermore, ¶ 301 states that "Plaintiffs do not concede the validity of Defendants' defenses." Eleventh Amendment immunity is the State's principal defense. If ¶¶ 302 and 303 did, in fact, manifest the parties' agreement that the State had

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[6] Many of the decree provisions can be reasonably read as setting goals as opposed to mandatory obligations.

waived its immunity to any enforcement proceeding, the language of ¶ 301 would be surplusage. In fact, the language suggests that the State was preserving its defenses—including its Eleventh Amendment immunity—for any subsequent enforcement proceeding. In any event, because the language of the decree contains no statement by the State expressly waiving its immunity from suit in federal court, petitioners cannot argue that the State has made a knowing and intelligent waiver. *See College Savings Bank*, 527 U.S. at 682 ("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights.") (internal quotations and citation omitted).

2. Petitioners further err in asserting that Texas's litigation conduct has effectuated a waiver of its immunity. *See* Pet. Br. 21. Contrary to petitioners' contention, that state officials acceded to a consent decree after they were sued does not involve the type of voluntary invocation of federal court jurisdiction that results in a waiver of the immunity with respect to any thing other than the entry of the decree. *See, e.g.*, *Lapides*, 535 U.S. at 619-20; *cf.* McConnell, *supra*, at 302 (consent decree "has no more force than any other agreement between a government official and a private party. It gains no authority by virtue of being filed with the court").

Unlike *Lapides*, this is not a case "'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination.'" 535 U.S. at 619 (quoting *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906)). Texas has neither filed a claim in federal court, *see Gardner v. New Jersey*, 329 U.S. 565, 574 (1947), nor made a "voluntary appearance" by intervening in a lawsuit to prosecute a claim. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883).

Nor has Texas "voluntarily invoked" federal court jurisdiction by removing a case from state to federal court. *Lapides*, 535 U.S. at 620. To the contrary, Texas did not become a party in federal court by choice. Rather, it was

subjected to the "coercive process of [a federal] judicial tribunal[] at the instance of private parties," *In re Ayers*, 123 U.S. at 505, because petitioners' suit compelled Texas to appear and defend itself. When the alternative is between settling and defending on the merits and being subjected to lengthy litigation in potential violation of its Eleventh Amendment immunity, agreeing to the entry of a consent decree cannot be deemed a voluntary invocation of federal court jurisdiction.

3. Petitioners argue that "when a State waives immunity by litigation conduct, it cannot change its mind later." Pet. Br. 21 (citing *Lapides*, 535 U.S. at 619). Petitioners further contend that "once a State waives immunity, 'it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Id.* at 21-22 (quoting *Gunter*, 200 U.S. at 284).

But even assuming that agreeing to the entry of a consent decree constitutes a waiver of immunity, the Court has long recognized that "[a]lthough the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity." *In re Ayers*, 123 U.S. at 505. This rule applies even though the consent was "given after much deliberation and for a . . . consideration," *Lynch*, 292 U.S. at 581, and "whatever the character of the proceeding." *Id.* at 582. Because a consent decree "gains no authority by virtue of being filed with the court," McConnell, *supra*, at 302, judicial entry of the agreement cannot override the fundamental rule that "immunity from suit is an attribute of sovereignty which may not be bartered away." *Lynch*, 292 U.S. at 582.

Moreover, neither *Lapides* nor *Gunter* involved a consent decree and are thus not pertinent authority. To the contrary, as *Lapides* demonstrates, waiver by litigation conduct is a narrow exception to the rule against implied waivers and

which is invoked only to prevent "generat[ing] seriously unfair results." *Lapides*, 519 U.S. at 619. Indeed, in *Lapides*, state law expressly waived the State's sovereign immunity in state court from the plaintiff's state law claim, *see id.* at 616-17, and this Court expressly noted that it was not "address-[ing] the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-18.

The *Lapides* Court recognized the unfairness of allowing the State's lawyers to remove the case from state to federal court and obtain a dismissal by invoking the Eleventh Amendment when the State had made the sovereign choice to waive its immunity for such a claim. As *Lapides* explained, "an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might . . . favor selective use of 'immunity' to achieve litigation advantages." 535 U.S. at 620.

This reasoning does not apply here. As *Lapides* itself notes, "the Eleventh Amendment waiver rules are different when a State's federal-court participation is involuntary." *Id.* at 622. Moreover, there are several additional reasons why Texas' litigation conduct should not be deemed a waiver of its immunity to this enforcement proceeding.

First, there is no reason for the Court to imply a waiver by litigation conduct when petitioners obtained no such concession in the terms of the decree itself. *See* discussion *supra* at 22-24. Putting aside the question of whether state officials can agree to a decree provision binding their successors in perpetuity from invoking Eleventh Amendment immunity, *cf.* McConnell, *supra*, at 303-04, there is no basis for the Court to give petitioners a right they did not obtain in the settlement negotiations.

Second, the Court has repeatedly held that "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised *at any stage of the proceedings*." *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) (emphasis added). *See also Pennhurst*, 465 U.S. at 99 & n.8; *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Indeed, the Court has held that a State can raise the immunity for the first time in this Court. *See Pennhurst*, 465 U.S. at 99 n.8 (citation omitted).

Here, as petitioners expressly acknowledge, the proceedings are interlocutory. Pet. Br. 37. "There is no final judgment," *id.*, and there has been no judicial determination that the State has violated federal rights. This is obviously not a case like *Gunter*, where more than thirty years earlier the State failed to raise its Eleventh Amendment immunity at any point in the original suit for injunctive relief, including the proceedings in this Court, and thus "voluntarily . . . submit[ted] its rights for judicial determination" and entry of a final judgment. *See* 200 U.S. at 284; *see also Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244, 247-49 (1872). Allowing Texas to invoke its Eleventh Amendment immunity in response to petitioners' motion to enforce thus does not threaten the integrity of federal court decrees by undermining a judicial determination that the State has violated a federal right.[7]

Third, petitioners' waiver theory is in essence an invocation of estoppel doctrine. But "even assuming that the Government is ever subject to estoppel, a 'private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.'" *Lyng v. Payne*, 476 U.S. 926, 935 (1986) (quoting *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984)). One of the elements that petitioners must show is a "detrimental

[7] Indeed, under the *Firefighters* standard a federal court is not required to make any finding that a defendant has violated a federal right.

change in position," *i.e.*, that the government's conduct "has caused the private citizen to change his position for the worse." *Heckler*, 467 U.S. at 61.[8]

This petitioners cannot do. By agreeing to the consent decree, petitioners gave up the right to go to trial. But even if petitioners had proceeded to trial, they were only entitled to relief necessary to remedy a continuing violation of federal law. *See Jenkins*, 515 U.S. at 89 (quoting *Milliken*, 433 U.S. at 280 ("'the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation'")). Petitioners can, however, still bring suit under the *Young* doctrine if the State is continuing to violate their federal rights, and under the court of appeals' holding, petitioners can obtain enforcement of the decree to the extent violations of its provisions are violations of federal rights. *See* Pet. App. 27a-28a; *see also* McConnell, *supra*, at 305 ("In the typical public law case, nothing more is required than to permit the private party to reopen the litigation, because the party has given up nothing other than the lawsuit.").[9]

Furthermore, petitioners received the benefit of the State's substantial efforts to comply with the decree notwithstanding that many of those provisions cannot reasonably be viewed as

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[8] While petitioners and the district court focus on the putative benefits the State gained by entering into the decree, *see* Pet. App. 259a (dist. ct. op.); Pet. Br. 25, they cannot show any harm as a result of the State's agreement to the decree.

[9] Petitioners contend that the State "obtained an order that protects them from further suit by other class members concerning the same issues because 'all members of the class . . . are bound by the judgment.'" Pet. Br. 25 (quoting 5 *Newberg on Class Actions* § 16.20 at 226 (4th ed. 2002)). The argument ignores, however, that thousands of persons who are now eligible for EPSDT were either not yet born at the time of the settlement or were not then eligible for Medicaid. It is implausible to suggest that these persons can be bound by the decree when they were not members of the class at the time the decree was entered. The decree therefore does not protect the State "from further suit." Pet. Br. 25.

relief necessary to remedy a violation of federal law. Thus, in no sense did Texas, by agreeing to the decree, cause petitioners "to change [their] position for the worse." *Heckler*, 467 U.S. at 61. Allowing Texas to invoke its immunity thus does not generate a "seriously unfair result[]." *Lapides*, 535 U.S. at 619.

On the contrary, petitioners' rule is a prescription for private litigants and federal courts to micromanage the operations of state government. It undermines the fundamental premises of our constitutional structure—that both state and federal governments are sovereigns within their respective spheres and that through the electoral process, the citizenry expresses its policy preferences to politically accountable officials. *See Alden*, 527 U.S. at 750-51.

Petitioners' waiver rule nullifies "a central tenet" of politically accountable government—that "the people, and their elected officials, must be allowed to change their minds." McConnell, *supra*, at 318. While state officials must obey federal law, *Alden*, 527 U.S. at 754-55, the Eleventh Amendment exists to preserve "the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. Thus, to protect this fundamental principle, the Court should make clear that state officials do not permanently waive the State's Eleventh Amendment immunity to an enforcement proceeding by entering into a consent decree.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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